

Public Utilities

FORTNIGHTLY



June 26, 1930

REGULATION BY INTIMIDATION
BY SAMUEL CROWTHER

PAGE 808

Uniform Aircraft Regulation
BY CLARENCE M. YOUNG

PAGE 814

The "Regulatory Rebellion"
in the Bay State
BY EDWARD W. MOREHOUSE

PAGE 829

The Inevitable Regulation of the Taxi
BY FRANCIS X. WELCH

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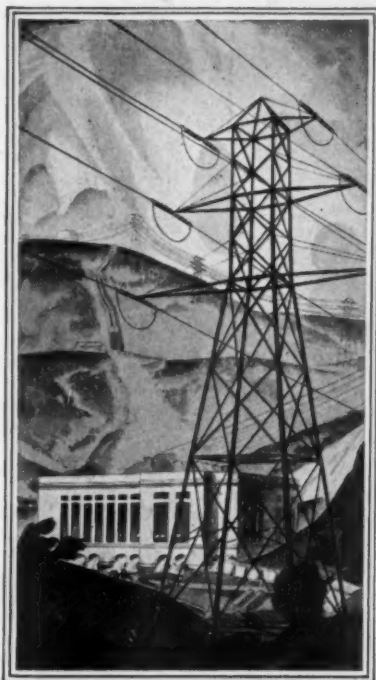
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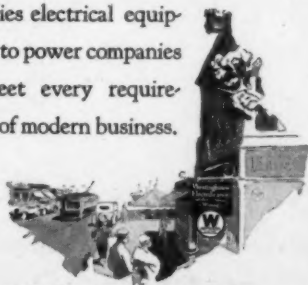
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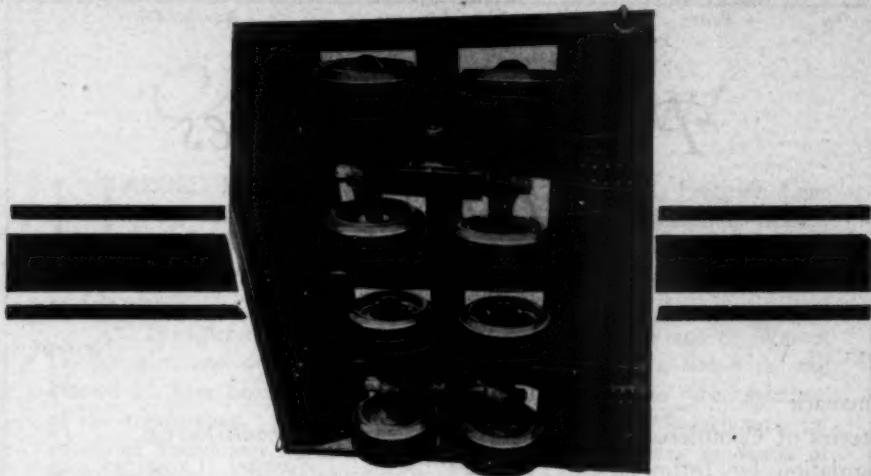
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Public Utilities Fortnightly



VOLUME V

June 26, 1930

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PUBLIC UTILITIES REPORTS, INC., PUBLISHERS

PUBLIC UTILITIES FORTNIGHTLY, a magazine dealing with the problems of utility regulation and allied topics, including the decisions of the state commissions and courts, now issued in conjunction with Public Utilities Reports, Annotated; endorsed by the National Associations of the Utility Industry and by the National Association of Railroad and Utilities Commissioners, and supported in part by those conducting public utility service, manufacturers, bankers, accountants and other users of the publication.

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Announcement

HAROLD K. FERGUSON, president of The H. K. Ferguson Company, international engineers and builders at Cleveland, recently announced that his company has acquired the business, assets and good will of *Warren D. Spengler, Inc.*, consulting power plant engineers of Cleveland.

The Spengler organization was established eleven years ago by Warren D. Spengler, and during its development his two brothers, Ralph A. and Harold H. have become associated with him in addition to other members of the organization. All three brothers are graduates of Massachusetts Institute of Technology, Warren and Harold in addition being graduates of Western Reserve University.

During the history of the company, the Spengler organization has been retained by several large utilities and industrial concerns to study and develop means of attaining more economical operation of their properties. On several occasions they have effected striking economies in the production and use of steam and power. Through their research they have also made important advances in low temperature coal carbonization.

Included among the Spengler clients are the Cincinnati Dayton Traction Company, now a part of the Cincinnati & Lake Erie Railroad; Fox River Division of the Aurora, Elgin & Chicago Railroad, now Insull property; Miami Beach Electric Company; Monsanto Chemical Works, St. Louis; Paul A. Sorg Paper Company, Canton, Ohio; and Western United Gas & Electric, Aurora, Illinois.

The entire personnel of Warren D. Spengler, Inc., will join The H. K. Ferguson Company, maintaining under new leadership the same activities as in the past, plus the complete construction and equipment service which the Ferguson Company maintains.

This is the second nationally known engineering concern which has joined The H. K. Ferguson Company within the last two months, the first being the De Vore Engineering Company of Toledo, Ohio, specialists in the design and layout of glass plants and paper mills.

According to Ferguson officials, it is their intention to place their engineering service on an ever-broadening basis so that their customers may obtain complete and authoritative answers to their problems within one organization combining architectural, engineering and construction service.

THE H. K. FERGUSON COMPANY
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Pages with the Editors

WITH this issue, PUBLIC UTILITIES FORTNIGHTLY concludes its Volume V.

FOR the benefit of those subscribers who desire to bind and preserve the thirteen numbers that make up this volume (January 9 to June 26, inclusive), an index is now being prepared.

COPIES of this volume index will be mailed, upon completion, to all subscribers who make application for them; requests may be addressed to PUBLIC UTILITIES FORTNIGHTLY, Munsey Building, Washington, D. C.

DURING the past six months, PUBLIC UTILITIES FORTNIGHTLY has made the most notable advance of its career—in circulation, in influence and in prestige.

AMONG its contributors have been numbered many of the most distinguished publicists, legislators, economists, lawyers, authors and business men in the country—leaders of public opinion and commanding figures in the industrial life of the nation.

THEIR views, as expressed in the pages of this magazine, have been widely quoted and commented upon in the daily and periodical

press—particularly those opinions which have dealt with important and timely problems of a controversial nature within the field of public utility regulation.

So important have been regarded the feature articles which have appeared in this magazine, and so many requests have been received for additional copies of them, that practically every edition has been exhausted; in order to meet the demand for extra copies of these special articles, dozens of them have been reprinted in pamphlet form.

IN addition to this service, the editors of this magazine are being called upon to take an increasingly active part in the deliberations over the problems of utility regulation.

INVITATIONS (that are really in the nature of drafts) are being received to address numerous gatherings of economists as well as national and state conventions.

AMONG the more important of these gatherings was the semi-annual meeting in New York of the Academy of Political Science, where our Mr. HENRY C. SPURR read a paper "Have the State Commissions Fulfilled their Intended Functions?" that was regarded as so significant that it was quoted broadcast in the newspapers of the country and which was later reprinted in pamphlet form.

"I HAVE received this masterly address by Mr. SPURR," writes JOHN G. CURTIS, Chairman of the Nebraska State Railway Commission; "I feel that he has handled this subject in a splendid way, and I know that all State Commissioners will appreciate the fair and honest treatment which he has given the subject."

"A VERY excellent article," comments JAMES S. BENN, of the Pennsylvania Public Service Commission,—who is seconded by ALEXANDER M. MAHOOD of the West Virginia Public Service Commission—and by a host of others.

THUS does this magazine extend its influence in numerous forms of activity quite aside from its purely editorial functions, and assume an active part in the controversies

(Continued on page VIII)



CLARENCE M. YOUNG

(See page 808)

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that beat about the whole subject of utility regulation.

SAMUEL CROWTHER (whose article "Regulation by Intimidation" starts off this number), is one of the most widely-known writers on business subjects in the country—not only on his own account, but in collaboration with such captains of industry as HENRY FORD, HARVEY S. FIRESTONE, A. B. FARQUHAR and others.

SINCE receiving his B.S. degree from the University of Pennsylvania in 1901 and his LL.B. in 1904, Mr. CROWTHER has been engaged in newspaper and magazine work—with a brief interlude as attorney for a public utility corporation.

So emphatic is Mr. CROWTHER's purpose to disclaim any association with the radicals (his frequent visits at the White House and his articles extolling the economic virtues of prohibition in the staid *Ladies' Home Journal* are in themselves ample evidence of his eminently conservative leanings), that he writes the editors as follows:

"I AM utterly against every form of extending the government into business, and I do not see how I can possibly be classified as a government ownership advocate—although some of the public utility people will believe anything."

His article in this issue is not an attack upon utilities, or upon the present system of regulation; it is, however, a frank and illuminating commentary on what the author believes is a short-sighted policy, pursued only by an occasional corporation but from which the utility industry as a whole suffers.

READ it!

EDWARD W. MOREHOUSE (author of "the 'Regulatory Rebellion' in the Bay State," on pages 814-826), is managing editor of "the *Journal of Land and Public Utilities Economics*."

AFTER graduating from Amherst College Mr. MOREHOUSE did his stint in the Army, and later resumed his economic studies at the University of Wisconsin, where he became associated with the Institute for Research in Land Economics and Public Utilities in 1923—two years before the Institute was placed under the academic wing of Northwestern University.

CLARENCE M. YOUNG (turn to page 808) is perhaps the best qualified man in the country to point out the urgent need of uniform regulation for aircraft—particularly the commercial aircraft that is assuming such importance as a public utility and which directly and indirectly affects the destinies of such other forms of public service as the railroads, the interurban railways and the busses.

AFTER receiving his LL.B. degree from Yale in 1910, Mr. YOUNG entered law practice in Iowa, served two years in the A. E. F., was appointed Director of Aeronautics, U. S. Department of Commerce, in 1926, and is now Assistant Secretary of Commerce for Aeronautics.

Will public utilities be a major issue in the coming political campaign this fall?

CERTAINLY there is accumulating evidence that a goodly number of our candidates for office are eagerly seeking to force the utility issue into the political foreground—possibly with the hope (as numerous observers are pointing out) that by concentrating the voters' attention upon utility valuation and rate problems they will distract attention from the ominous bugaboo of the wet-and-dry issue, which both political parties are so strenuously dodging.

JUST what the outlook is for projecting the utilities into the political arena this fall will be surveyed and analyzed in the coming issue of this magazine—out July 10th.

THE loud and not altogether decorous laugh that greeted the ill-tempered outburst of certain legislators against the new dial telephones in the Senate wing of the Capitol, recalls the attempts of an Englishman to get a connection with a friend over the long-distance telephone, and who was having difficulty in making the operator understand the name of the exchange, which was Ealing.

FINALLY in desperation, he said:

"E FOR 'erbert, A wot 'orses heat, L where yer goes when yer dies, I for ingine, them things in front of trains, N what lays eggs, G for golblime. Now, 'ave yer got it?"

THE next number of this magazine will be the first of the new volume—Volume VI.
—THE EDITORS.

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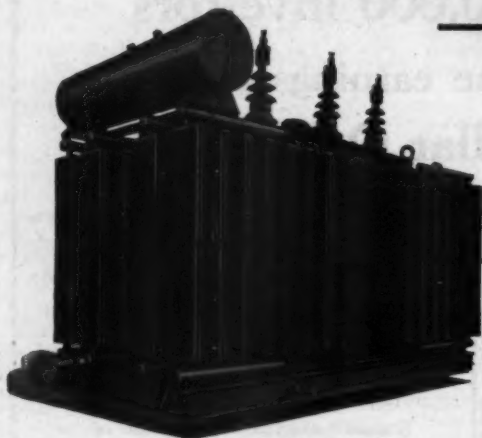
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JUNE



Reminders of
Coming Events

ALMANACK


Notable Events
and Anniversaries

26	T ^h	The discovery of gold in Denver, Colorado, precipitated a rush of immigration that led to the building of the Denver & Rio Grande Western Railroad; 1858. 
27	F	New York and Boston were connected by telephone service—despite Uncle Sam's previous refusal to recognize the practical value of S. F. B. MORSE'S invention, 1846.
28	S ^a	Railroad trains on the original Santa Fe line between Topeka and Carbondale made their initial run on scheduled time, 1869.
29	S	The first decked vessel ever built in America was launched from Manhattan Island in 1614 by her Dutch builders; she was 44 feet long and was named the "Onrust;" 1614.
30	M	The Illinois Commerce Commission (successor to the State Public Utilities Commission, established in 1913) was created by the state legislature, 1921.



JULY



1	T ^u	Two Public Service Commissions were organized in New York state, (to be superseded 14 years later by the present Commission), each with its jurisdiction; 1907.
2	W	The famous wood-burning locomotive "William Crooks" entered Minneapolis for the first time over the tracks of the St. Paul and Pacific Railroad Co., 1862. 
3	T ^h	The vast importance of traffic ways to national prosperity was attested by the citizens of Rome who paid honors to CLAUDIUS for constructing the Appian Way, 312 B. C.
4	F	The first shovelful of earth was turned in the construction of the Pacific Railroad, marking the beginning of the traffic lines of the West, 1851.
5	S ^a	The word "telephone" was first applied to an air-operated fog horn (a development of the speaking-trumpet), devised and used by CAPTAIN JOHN TAYLOR, 1845.
6	S	CLERK MAXWELL read a paper before the Royal Society, London, in which he predicted the existence of "electric waves" now used in radio communication, 1869.
7	M	Government support of private ownership was secured when Parliament freed colonial merchandise from duty on all shipments made in British vessels, 1646.
8	T ^u	¶ The 42d Annual Convention of the National Association of Railroad and Utilities Commissioners will be held in Charleston, S. C., November 12th to 15th, 1930.
9	W	The present law under which the Railroad Commission of Wisconsin now operates was approved by the state legislature, 1907.

"The electrical industry . . . is the greatest single material service that has ever been rendered mankind."

—CONGRESSMAN CHARLES A. EATON



From a lithograph by Joseph Pennell

Arteries of Commerce
THE ELEVATED; NEW YORK

Public Utilities

FORTNIGHTLY



VOL. V; No. 13

JUNE 26, 1930

Regulation by Intimidation

DURING the past three years of continuous investigations, threatened legislation, and attack by the two most powerful chains of newspapers in this country, the utility corporations have been struggling through a period of uncertainty, hesitancy, and doubt. The silence with which these assaults have been generally met, observes SAMUEL CROWTHER in the following article, is due to the fact that the utilities "will not learn their own case sufficiently to have complete confidence in its fairness . . . and go to the public squarely on the facts." It is largely within the powers of the utilities themselves, he believes, to bring to an end this era of intimidation that is so costly to the industry and to the public alike.

By SAMUEL CROWTHER

WHILE there is at the present time a more or less general agitation to the effect that the Commission plan for regulating public utilities has fallen down or is at least tottering, little attention is being given to the new method of regulation which has arisen and which to a large extent now controls the actions of the utilities and the Commissions. Yet from one point of view this is the most successful system as yet devised. It is well developed and effective. It produces quick results—because it has the instant co-operation of the utility companies.

This new procedure—direct and extra legal—may accurately be called "regulation by intimidation."

THE public today has very little patience with law or lawyers mixing into those everyday affairs which primarily have to do with state and municipal housekeeping. The Utility Commissions are creatures of the legal mind which always conceives of a court as necessarily the eventual arbiter of any issue. The Utility Commissions were organized as intermediate courts of conjecture to play around with cases which (ac-

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ording to some critics) if important, could be brought into real courts for conclusive adjudication.¹ Some Commissioners, as well as judges and legislators with political ambitions and realistic turns of mind, have been more intent on making decisions that would get their names into the newspapers than with making decisions on the facts and in the broad public interest. A noble gesture will have more acclaim than a reasoned opinion. Some of the more canny of our public servants have remembered that a certain judge gained a national reputation simply by imposing the biggest fine that a court had ever imposed—and that his reputation was not in the least dimmed by a higher court revising his discretion. This tendency to make the front page at any cost has notably grown in recent years since it has become very plain that the best a conscientious Commissioner could hope for was oblivion, whereas a true friend of the people might with a little luck get some reputation and a better job. And so to the untutored bystander in the street it has seemed that the Commissions were high spirited, progressive bodies dedicated to the service of the public—but with their good intentions always being frustrated by the evil machinations of courts and lawyers.

A man of average understanding cannot comprehend why the purely economic problem of, say, a rate for electricity should resolve itself into an

interpretation of that clause of the Constitution which says that property shall not be taken without due process of law. A man of more than average understanding finds difficulty in comprehending just how the law is satisfied by arranging rates in an effort to guarantee an arbitrary profit upon an investment of disputed value and undisclosed wisdom. Thus the public has come to class the proceedings before Public Service Commissions with the testimony of alienists in murder trials and only asks that, if they cannot be anything else, they at least be entertaining. And just as vigilance committees sooner or later grow up in communities where there is no law, so regulation by intimidation came into being and it has grown and flourished because it has been successful.

THE utility companies, with a few exceptions, have managed to transform every political investigation into sprightly news.

The public, which is primarily interested only in service and does not want to be bothered, has been educated around to the point of believing that the utilities have something to conceal, that they are not at all the public servants they have been representing themselves to be and that it cannot do any harm and may do a lot of good to put them through the third degree.

The executives of the utility companies may protest that they are being investigated for purely political purposes and that their affairs are being misrepresented by a small group of politicians and newspapers that want material for a campaign in favor of

¹ EDITOR'S NOTE: As a matter of fact, appeals to the courts from Commission decisions appear to be the exception rather than the rule. This is shown by the infinitesimal number of appeals compared with the total amount of Commission business. In New York state alone, from 1921 to 1928, the Commission entered 11,440 formal orders from which only 3 appeals were taken to Federal courts, and only 2 of the 3 appeals involved rate questions. From the same 11,440 orders only 33 appeals were taken to state courts.

How the Policy of Intimidation Started

"It is generally believed by the average citizen that the public utility companies have out-generated the Commissions. It makes not the least difference whether this belief is sound or unsound. Hence the natural impulse is to threaten the companies with public ownership. And for some unknown reason the threat throws the utilities into a most dreadful panic. That is why the present policy of regulation by intimidation has been so generally followed and why the public so joyously looks on."



public ownership. That is very true. But it is equally true that enough utility companies have handled their public relations so badly as to give color to the charges made against them. They have made themselves fair game.

The politicians are not at fault. The main business of a politician is to stay in office. That has always been so and probably always will be so. Anything else that he does is incidental to the main job of staying on. A good politician reads the mind of his public and gives them the sort of thing that they like best; the political genius judges the public mind in advance. Utility baiting is today good politics—just as it was many years ago. The public is inclined to be highly critical of the utilities—and the edge of their criticism has not been dulled by the stock market actions of some utility stocks. It is being discovered that widespread stock distribution is not just one lovely little thing after another and that stockholders can forget their manners.

THE American people taken in the mass are extremely intelligent and also they are very just. In all affairs of moment they have a way—apparently without reasoning—of arriving at a fair and right decision. They have refused, for instance, to become more than mildly interested in the many fantastic European political nostrums which are so freely offered to them as representing advanced political thought. Our people, indeed, are not really politically minded at all and for many years past the national elections have turned on economic questions only slightly disguised as political.

Our newspapers do not mould public opinion to any large degree. In New York city, for instance, the newspapers are almost solidly anti-Tammany—and almost any Tammany candidate can win. A wholly partisan newspaper giving up its chief space to opinions, after the fashion of the European journals, would here be a flat failure. Our people insist on having the news and, although the

PUBLIC UTILITIES FORTNIGHTLY

news values differ greatly, even the most blatant tabloid frankly devoted to sensationalism contains more real news than the most ponderous Continental daily. Most newspaper editors have discovered that it does not pay to muckrake and that if they really want to bring about a reform, one of the surest ways of not doing so is to open the floodgates of invective. A cynical man with a bad record could ask nothing better than to be hounded by the newspapers, for then the public, without looking into the facts, will decide that, whatever he may be, he cannot be so bad as he is painted and will react against what seems to be unfairness.

Our newspaper editors and reporters are not venal. They are all human beings and, therefore, are open to influences of various kinds, but they cannot be bought. One of the oddest of the many odd tenets of the radicals has to do with the "hired press." The radical press never admits into its columns any item which cannot be twisted to conform to the purposes of the paper, and any editor who permitted an impartial, not to say an adverse, piece of news would be fired. They sincerely believe that all newspapers are made up in that fashion, for most of them had their training in European journalism. Our newspapers will write editorials into their headlines, will play up some kinds of news beyond its value, and play down other news even to the point of suppressing it altogether, but the number of newspapers that will deliberately distort a news story in order to work an opinion into it is so small as not to be worth considering. The *New York Times* is entirely opposed

to government ownership but it will play up a government ownership story to its full news value. The American newspaper today, in spite of all the twaddle about the absence of great editors, is an open forum for news and for opinions that turn up as news. More than that, any man who discovers a new way of beating the tomtom gets a full chance to beat it.

Our editors conduct their newspapers in this fashion as a matter of course. They are so inherently fair that long-winded speeches about the freedom of the press have gone quite out of fashion.

Most of those who complain about the press want favors rather than fairness.

THIS would seem to have nothing whatsoever to do with regulation by intimidation. In fact it has everything to do with it. Aside from differences of opinion on the details of the administration of private ownership and its relations with the public, there is a small but exceedingly vocal party which desires the public ownership of all the public utilities and hence, in advocating their course, seizes upon every likely incident of private ownership as propaganda material to break down public confidence in private ownership. In doing this they are wholly within their rights.

I, for instance, believe that there is nothing either right or wrong in the private ownership of public utilities. I think that the sole question is one of expediency. I believe that an able management in a profit-making enterprise will give a far better service than the government can possibly give and that public ownership is squarely

PUBLIC UTILITIES FORTNIGHTLY

against the public interest. Therefore, I am opposed to it, but in being opposed to it I cannot bring myself around to the belief that all those who agree with me are saints and that all those who disagree are sinners. Also I know that it is quite impossible for many people to envisage any contest as being other than between the forces of good and the forces of evil. A most excellent case can be made out for public ownership, but to my mind a better case can be made out for private ownership. However, it appeared in the proceedings before the Federal Trade Commission that the executives of some of the public utility corporations were more anxious to prevent the public ownership people from having their say than they were to present their own case and there was considerably more than a suspicion that the majority of the publicity agents who had been hired by the utility companies did not know that private ownership had a case. The outsider gained the viewpoint that the utility companies knew that public ownership was infinitely righteous but that they must at all costs keep the news from the people—at least until they had completed certain nefarious projects. I know that is nonsense but I do not know it from anything that the public utility agents

have told me. It so happens that I have studied the question from the outside.

Now a greater number of citizens do not care in the least whether utilities are owned privately or publicly and they would prefer to let them remain in private hands rather than run the possibility of having to hang around the city hall for half a day in order to get an electric light meter repaired, but they do want to know what it is that the utility companies apparently have to conceal.

It will be noted that I have spoken of the utilities as a group—as though the practices and the finances of all the companies were quite alike with the implication that what is true of one is true of all. This again is nonsense. But before the Federal Trade Commission the utilities gave the impression of appearing as a single unified group, all the members of which were willing to stand or fall together. The silliest letters read into the record were written by publicity agents of not very important companies, but because the companies appeared as a group these personal letters had the same weight as though they had been written by the most important men in the most important companies. And then other circum-



Q "A GREAT number of citizens do not care in the least whether utilities are owned privately or publicly, and they would prefer to let them remain in private hands rather than run the possibility of having to hang around the city hall for a day in order to get an electric light meter repaired, but they do want to know what it is that the utility companies apparently have to conceal."

PUBLIC UTILITIES FORTNIGHTLY

stances with which the utilities themselves have had nothing to do have tended to make the public somewhat critical of the plain common sense of business executives generally. The various lobby investigations have disclosed that many prominent business executives should not be allowed to wander around Washington unless with a governess, for they have disclosed a positive passion for picking up with and paying good money to almost anyone who pretends to know the President or a few Congressmen or who can otherwise exercise influence. The plain truth is that in the last few years the turn of the wheel has brought to the top a lot of business executives who are just accidents swelling with the power they do not know how to use. The utilities have no more of these men than any other line of business—it is only that they have at the moment larger opportunities to get in wrong.

IN some sections of the country the public has come around to distrusting Public Service Commissions, and this is because they seem to function as courts. Whatever they do seems only preliminary to a case in the courts and also there seems to be a considerable mix-up between the state and the Federal courts. Our people today distrust courts.

People are inclined to think of courts as pettifogging institutions which contrive to deal out a species of justice which runs counter to common sense. A great deal of this impression is directly traceable to the absurd shows which some judges allow to be put on as murder trials—but the public has little occasion to

distinguish between the civil and the criminal arms of the court.

If it can be shown that even a few of the public utility corporations have juggled stocks and values, even while giving service of a very high character at fair rates, the public will incline toward public ownership as a way out of the mess. The Public Service Commissions are, as a rule, intelligent bodies of men, but they are asked to pass upon a wide array of problems ranging through finance, rates, equipment, and service. In the beginning they were set up to give a super-control in the best interests of everyone, for when they came into fashion the country still had the naive belief that anything could be accomplished by law and that, if one gave an official body certain powers, wisdom would settle down upon the members of that body as of course.

PROBABLY nothing has done so much to shape confidence in the regulatory bodies as the procedures which attend rate making. The representatives of a utility in a rate case are always lawyers and the case always takes on the appearance of a battle between the rights of the people and the greed of the utility. The company brings in engineers and appraisers who testify that the property of the company is worth some tremendous figure. Then the opposition brings in engineers who testify that the property is worth hardly anything. The public ownership bugs buzz in and out of the proceedings. Every man in business knows to his sorrow that he cannot earn a profit on his errors of judgment and he cannot see why a utility is entitled to earn a

Where the Cause Lies for the Misrepresentation of the Utilities

"THE executives of the utility companies may protest that they are being investigated for purely political purposes and that their affairs are being misrepresented by a small group of politicians and newspapers that want material for a campaign in favor of public ownership. That is very true. But it is equally true that enough utility companies have handled their public relations so badly as to give color to the charges made against them. They have made themselves fair game."



profit on every penny it has ever spent regardless of the wisdom of the expenditure and regardless of how the property is managed. He cannot see why a utility can be decreed a profit by law based on the amount of its investment when he must struggle along to make a profit as best he can. He is, as usual, right. If a new school of public utility executives had not arisen to grasp the significance of volume sales, we should not have had the tremendous advances and the fine engineering which our great utilities exhibit, for with the rate structure now in effect, a utility could plod along making a profit without the use of any brains whatsoever. There is no financial incentive to get the best if a profit can still be had using the worst.

THE whole Commission procedure has become so legalistic that it seems to bar decreases in rates and uphold increases in rates. They do not in fact do that, but they seem to, and when a strong-minded governor,

like Alfred E. Smith of New York, wanted to put in some plan of his own and found himself barred, he could gain public sympathy and support by taking pot-shots at the Commissions. In this he has been followed by Governor Franklin D. Roosevelt, who is trying to bring the whole system of utility regulation to a head. Recently he said:

"At present there are two important main phases of public utility relations with the state, as the creator of public utilities, that call for consideration.

"The first phase involves the drawing of a perfectly definite line of procedure, separating the Federal jurisdiction from the state's jurisdiction and restoring to the state courts, and vesting in them only, the right to review public utility rates, leaving open only an appeal to the United States Supreme Court after our own court of appeals has passed upon a question.

"The second phase is far broader. We have got so far away from the common law theory of what a public utility is entitled to earn on the

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private capital invested therein and so far away from Governor Hughes and his original intention when the Public Service Commissions were created in 1907, that we are forced to make a complete re-study of the entire question of relationship.

"This new study necessarily would include much needed changes in the regulatory method of the Public Service Commission and the law under which that body operates, and also of the desirability of new forms of contract between the state and its servants, the public utility companies.

"But today the cry is not only for a fair return on the original investment, but on appreciation as well. That may be all right where a private corporation is concerned, but as I see it, a public utility corporation enjoying a natural monopoly under the protection of the state, is on a different footing."

THIS is very different from the views of William A. Prendergast who recently resigned as Chairman of the New York Public Service Commission:

"What is the function of the Public Service Commission? The function of a regulatory Commission is to see that the public and the utilities are treated with exact justice; that one is not favored to the disadvantage of the other, and that discriminations of all kinds are eliminated. This was the purpose in making the Commissions *quasi-judicial* tribunals.

"There exists an impression that the Public Service Commission really can be the prosecutor of the corporation. The fact is that partisanship, or anything pertaining to the quality of prosecution has no place in the methods that should be employed by a Public Service Commission. It is a fact finding body and the highest courts, Federal and state, have so decreed. . . .

"I am opposed to outside interference, because it cannot fail to embroil the Commission in politics and make it a political rather than a judicial forum. May I quote this example as proof?

"When the petition of the Consolidated Gas Company of New York to acquire the capital stock of the Brooklyn Edison Company was before the Commission for action (hearing having ended), Governor Smith (July 31, 1928) sent the following telegram to the Public Service Commission:

"I request that individual or organizations be given an opportunity to be heard for or against the question of merging electric light and gas companies now pending before your Commission."

"The case was not reopened, but partisan papers and individuals immediately took sides because the Governor had spoken and it was important to them that he should be obeyed. In other words, what was solely a question within the discretion of the Commission became a partisan issue, with the Commission the target of political censure.

"Here we have the question of executive interference with the Public Service Commission squarely presented. Not to comply with the Governor's request meant a heavy blow to his political prestige."

IT is generally believed by the average citizen that the public utility companies have outgeneraled the Commissions. It makes not the least difference whether this belief is sound or unsound. Hence the natural impulse is to threaten the companies with public ownership. And for some unknown reason the threat throws the utilities into a most dreadful panic.

That is why the present policy of regulation by intimidation has been so generally followed and why the

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public so joyously looks on. The public does not in the least care how many private files are ransacked—provided the contents are interesting. It dislikes snooping only when the snooping brings no results.

It is a shocking state of affairs to confess that the political bodies and the utility companies cannot get together and end regulation by intimidation—for out of such jockeying can come nothing which is constructive. No finer body of engineers has ever been gathered than serve the American public through the utilities. The progress in the whole art within twenty years has been astounding. The country is beginning to learn that electricity and gas are splendid servants. If the dead hand of government ownership settles on this, we shall progress in the next twenty years just about as much as the postal service has progressed. We shall

never even have a chance to know how much we are losing.

AND yet the utility companies are bringing on public ownership faster than its advocates simply because they will not first learn their own case sufficiently to have complete confidence in its fairness, regardless of the law, and go to the public squarely on the facts. Mr. Owen Young has summed up the situation in the following words:

"As to the power and light industry, I believe the industry as a whole is soundly financed and efficiently managed. If, however, there has been unsound financing or other unwise proceedings in the promotion of corporations, it is desirable that the fact should be known so that any tendencies in that direction may be corrected. Any investigation, however, should be specific and non-political, and have for its object fair and full disclosure of the facts."

What Attacks on Utilities Cost the Ratepayer

"THE present attacks on electric utilities are important, not so much to the utilities as to the public. The utilities as businesses will survive them, the better because so much of what is said is untrue, but just to the extent that repetition of misstatements or untruths unsettles the public in respect of the honesty of our industry, the fairness of its rates, the adequacy and impartiality of public regulation and control, by just so much will our ability to do our future job be impaired. By just so much will it be harder or more expensive for us to finance the future growth of our companies. By just so much will it be more difficult to extend and improve our service. By just so much shall we be handicapped in enlarging our sales and readjusting our company structures for economies, both of which elements are necessary in order to make lower prices for current supplied."

—MATTHEW S. SLOAN
PRESIDENT, NEW YORK EDISON COMPANY



Uniform Aircraft Regulation

A Call to the States to Co-operate with the Federal Government

COMMERCIAL air transport is a new but important public utility that is destined to grow enormously—and to extend its activities with slight regard for geographical borders. The interests of the public as well as of the industry demand similarity of standards and of legislation. Here is a new regulatory problem for the state law-makers and the State Commissions; Secretary Young here outlines what should be done about it.

By CLARENCE M. YOUNG

ASSISTANT SECRETARY OF COMMERCE FOR AERONAUTICS

THERE must be uniformity throughout the United States in the regulation of air transportation, of aircraft operation, of aircraft airworthiness, and of competency of pilots.

Obviously, uniformity depends on the exact similarity of the various state requirements in the premises. Again, obviously, uniformity will be utterly lacking if there are forty-eight separate and distinct licensing agencies, even though the requirements may be identical.

Uniform regulations and requirements are not of the greatest value unless enforced. Therefore, the attention of states, commissions, or other qualified state agencies should be given to the subject of such uniform regulations and requirements, with suitable enforcement provisions.

UNDER the Air Commerce Act of 1926, the Department of Commerce can only impose its licensing requirements upon aircraft and airmen engaged in interstate air commerce. It can, and does, however, extend the licensing privileges to intrastate owners and operators of aircraft. The result has been that the majority of the latter have found it desirable to take advantage of the privilege by voluntarily applying for licenses, which carries with it the inspection of aircraft and examination of airmen as to their airworthiness and competency.

Also, under the provisions of the same act, unlicensed aircraft and airmen, engaged in air commerce in any way whatever, are obliged to confine their operations to the borders of a given state in which there are no lim-

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iting state laws. The results are more or less obvious. Thus far, at least, not all aircraft and airmen are airworthy and competent. Some are disapproved for various reasons when they are inspected or examined by the field representatives of the Department of Commerce. In such cases there is but one alternative in acquiring airworthy aircraft or improving the ability of the airmen—to resort to intrastate operation in a state that has no law, or an incompetent law, in the premises.

THE remedy, under the existing Federal law, requires suitable state legislation. Once an aircraft is in the air there can be no distinction between its interstate or intrastate character. It must be equally airworthy, the pilot must be equally competent, and the same rules as to passing, crossing, signaling, and landing, must be rigidly observed. Inasmuch as there can be but one standard of airworthiness, only a limited range of piloting ability, and no variation in rules, then it would seem obvious that state laws dealing with regulation should provide requirements identical with those of the Federal law.

There are, apparently, several ways in which the required uniformity may be accomplished. The simplest seems to be the enactment of a state law which would, in its effect, require all intrastate aircraft and airmen to be Federally licensed.

This at once sets up the identical requirements and obviates the necessity of a state inspection system with its attendant difficulties, complications, and expense. The air traffic rules of the Department of Commerce

are universally effective—that is, they are equally applicable to interstate and intrastate operations in the air. But experience has indicated that local enforcement of penalties for violations is desirable. Therefore, if the state Constitution does not permit the adoption of the Federal air traffic rules by reference, then it would doubtless be in order to incorporate them in the state law, by authorizing a state official to promulgate air traffic rules identical with those of the Federal Government, and to maintain them in current condition by likewise promulgating any amendments which may be made effective by the Department of Commerce. Authority to enforce them should, of course, be included.

AN alternative method is to provide for either state or Federal licensing, the former setting up identical qualification requirements. That is, intrastate aircraft and airmen not licensed by the Department of Commerce must obtain state licenses.

On first examination this arrangement would appear to be fairly satisfactory; because the Federal licenses permit interstate operation and are thus broader in scope, they would in all cases be preferred, and the state would thus avoid the necessity of issuing licenses. Experience has indicated, however, that it is of doubtful satisfaction. The state, as a matter of fact, will be called upon at least to be prepared to issue licenses. And, unfortunately, many of the applicants will be those who have failed to qualify for the Federal licenses. Presumably, such applicants will either possess unairworthy aircraft, or not

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yet have become sufficiently proficient in piloting, depending upon the nature of the license applied for. The state inspectors will then be required to pass upon the same aircraft or airman and arrive at independent conclusions. They may or may not concur with the previous disposition of the cases by the Federal representatives, particularly in the light of local influence which may be brought to bear, and there is at once manifest the absence of one of the most needed elements—that of uniformity throughout the entire United States.

IT should be remembered that the licensing of aircraft is not limited to that which is in existence and operation at the present time. It includes new production of known designs, as well as any yet to be designed and produced; it involves construction requirements, load factors, workmanship, soundness of design, material, and flight characteristics — items which call for the services of technically qualified personnel. Therefore, an independent state inspection system would need to contemplate the initial approval of aircraft, because not all manufacturers have yet met the Federal requirements, and those which lack such approval are potential applicants for state licenses. A

suitable technical staff would thus be an essential part of any state system.

IT is an exceedingly difficult task to organize and develop an inspection agency or system—one that is competent to include all of the requirements involved. Likewise, it is burdensome so far as expense is concerned. The Department of Commerce has made painstaking effort to perfect such an organization. It has especially trained its personnel and has made results uniform throughout its entire inspection and engineering staff. The requirements imposed by it are only the minimum consistent with safety in aircraft operation. Any modification of them would not be in the interests of either intrastate or interstate ownership or operation, and, therefore, would unfavorably affect the general advancement of air transportation.

On the other hand, there can be entirely too much regulation, too many requirements to be met.

Any state could easily legislate to the disadvantage of aviation, penalizing it to the extent that it would avoid the state, if possible.

There is, then, a mean in the matter of control and regulation which apparently has been accomplished in an eminently successful way by the



Q *"IF the state Constitution does not permit the adoption of the Federal air traffic rules by reference, then it would doubtless be in order to incorporate them in the state law, by authorizing a state official to promulgate air traffic rules identical with those of the Federal Government, and to maintain them in current condition by likewise promulgating any amendments which may be made effective by the Department of Commerce."*

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Federal agency, the Department of Commerce, and it seems obvious that both its requirements and personnel should be taken advantage of to the fullest extent by all states of the Union.

THERE are now twenty states and territories which require Federal licenses for all aircraft and airmen; twelve that require licenses for aircraft and airmen engaged in commercial flying; six that require state or Federal licenses; six that require state licenses, and eight states which require no licenses for aircraft and airmen at all.

This is evidence of the desire of the states to comply with the very essential need for uniformity.

THE matter of state regulatory legislation is an important one. The Department of Commerce has given much thought to it and has prepared four suggested forms of state laws in the hope that they will serve as a guide in the interest of uniformity.

The first draft is premised upon legislation enacted by New York state, with changes which are designed to remove certain ambiguities. It requires a Federal license for all pilots and all aircraft operating within the state. It would not necessitate any additional personnel or any increase in cost to the state. Local police authorities could handle violations in the same manner now provided for motor vehicles. Transgressions would be for violation of the state law requiring a Federal license rather than a violation of the Federal Act.

The second draft is suggested as

an amendment to the state penal code and accomplishes the same result as outlined in the first plan. It has been suggested that this draft may conflict with some of the state Constitutions; therefore, consideration should be given this question before enactment is undertaken. It is recommended for its brevity and conciseness.

The third draft is modeled after one prepared by a committee of the American Bar Association and requires either a state or Federal license. Such legislation would necessitate setting up a state inspection system with its attendant costs and complications. The draft, however, does not contemplate the actual issuance of licenses by the state. Rather, it is intended that the state and Federal license requirements will be identical, in which case the applicant would prefer the latter because of its broader privileges. This draft does not definitely assure uniformity to the same extent as the preceding ones. It would permit a state to depart from the Federal requirements, with its consequent confusion to the industry, thus defeating the purpose of uniform state legislation. If, due to some state constitutional provision, this draft is the best type of legislation that can be enacted, it is highly desirable that extreme caution be exercised in promulgating requirements for state licenses in order that they may conform to the Federal requirements.

THE final suggested draft is for states which desire to acquire landing fields and airports. Such legislation will depend entirely upon the

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fiscal legislation of the state and has been provided for informative purposes only; it is a revision of legislation already enacted by some of the states. Such legislation may be combined with regulatory features outlined in the foregoing or may be enacted as a separate measure.

All that has been said up to now has dealt with the general subject of the operation of aircraft and airmen, either in interstate operations or in the operations within the borders of a state.

SCHEDULED air transportation of passengers for hire over fixed routes is in a somewhat special category; this matter now is receiving the close attention of the Aeronautics Branch. There is nothing in the Air Commerce Act and the Air Commerce Regulations which prohibits any person, firm, or corporation from employing licensed pilots and acquiring licensed planes, planning the operation of an airline between two terminals and carrying out those plans. If the management chose, it could operate the planes over the dan-

gerous flying terrain, over uncharted airways, and without the benefit of the present known aids to air navigation such as the radio range beacon, two-way radio communication between the plane and the ground; beacon lights, intermediate landing fields, and weather service.

The Department of Commerce has under consideration proposals to require adherence to a standard of minimum requirements for the operation of scheduled air transportation over fixed routes, by all concerns engaged in transportation of passengers for hire or contemplating such services.

It is felt, however, that the best results can be obtained by regulations promulgated by the Department, rather than by national or state legislation, because of the flexibility of the former. From experience gained in carrying out the terms of the Air Commerce Act of 1926, it has been found best to proceed cautiously and conservatively, applying remedial regulations only when the need for them has been demonstrated or become apparent.

Facts and Fallacies About the Federal Power Commission

FOR months the newspaper headlines have been featuring the political storm that has been spending itself about this body—yet the exact functions of that body are little known or understood. Just what the Federal Power Commission is, what its regulatory duties are, and what relation it bears to the State Commissions will be told by WILLIAM ATHERTON DUPUY in a coming issue of this magazine.



Putting Up the Tax on Electricity

CERTAIN newspapers of West Virginia condemn the action of the West Virginia legislature in fixing a tax of \$10 a year per 100 horse power on hydroelectric developments instead of a much higher tax.

One paper commends former Governor White for seeking a tax of \$200, instead of \$10 and says that question will come up again in the next legislature.

This, of course, is merely a question of how much the customers of electric companies want to tax themselves for their electricity. On the one hand, the people are usually urged to seek lower rates; and on the other hand, to tax themselves into higher rates.

They would not urge taxation, to be sure, if they knew they were taxing themselves. But the people of this country have been lured into levying taxes on themselves by many false ideas.

Suppose you or I own a lot and want some one to build a house on it. We have to allow the builder to enter upon our land, or else we could not get the house.

We say to ourselves: "To allow another man to occupy our land for several months for the purpose of erecting a building on it for us is a great privilege. Are we not the owners of the land?"

So, we say to the builder: "If it were not for us you would not have this job. We shall have to tax you for the opportunity we have afforded you to make money."

The builder agrees. We charge him \$200 for the right to go on our land; but the builder, as a matter of course, adds that \$200 to the price of the house. It is apparent that we gain nothing by that charge.

But, if the city could levy the tax we would lose by it. We would have to pay it just the same, but the proceeds would go into the city treasury. It would thus help lighten the tax burden on the other citizens. It would be a discrimination against us.

If all of the citizens used the hydroelectric current in equal proportions, it would make no difference in the amount of their total tax bill whether the tax were \$10 or \$200 per horse power, provided the company could collect the tax. It would be just as if a lot owner taxed a builder who was building him a house.

But if some citizens use the electricity and some do not, the proposed tax is a burden upon the users of the current, partly for the benefit of those who do not use it.

If the users of electricity should insist on a high tax on it, they would merely be spanking themselves.

Henry C. Spurr

The "Regulatory Rebellion" in the Bay State

THE attitude of the Massachusetts Department of Public Utilities has been viewed with increasing alarm by some, who regard it as a "hot bed of economic treason" which pursues its way in defiance of the law; on the other hand it is considered by others as a body as progressive as it is independent. Certainly the fact that its policies differ materially from those of other State Commissions have precipitated wide debate. In this article the author presents a sympathetic interpretation of the Department's contribution to Commission regulation.

By EDWARD W. MOREHOUSE

Is the Massachusetts Department of Public Utilities a regulatory rebel? Are the mandates of the highest court being defied by its "seditious" Commissioners?

Has the Bay State become a hot-bed of economic treason?

These are just samples of questions raised either by implication or point-blank in current *critiques* on the regulatory policies of the Massachusetts Department. Such critical authors have painted a picture of a Commission defying the Supreme Court of the United States and refusing to abide by the "law of the land" on valuation and rate regulation as declared by that court.

Dr. Irston R. Barnes draws such a picture after a meticulous survey of the control of security issues, rates, and the Commission's proposed contract bill.¹ Mr. Carl D. Jackson²

likewise criticizes the Commission because it controls market prices of stock instead of fixing reasonable rates based on value of property determined according to Supreme Court doctrines and because it controls rates on the basis of "capitalization, stock prices, and dividends." And Mr. Jackson concludes: "No form of Commission regulation violating the above principles [enumerated by him] can retain public confidence." I object to the implication that the Massachusetts Commission is not entitled to public confidence. I reach a different view of the validity of Massachusetts regulation, because, in considering much the same materials as these two writers, I emphasize different features of the Commission's work and see an underlying purpose and technique which these writers have largely overlooked or underestimated.

THE position of the writers seems to have two corner stones:

(1) Commissions were set up to

¹ Irston R. Barnes, "The Challenge of the Massachusetts Commission," *PUBLIC UTILITIES FORTNIGHTLY*, October 31, 1929, pp. 540-551; November 14, 1929, pp. 596-609.

² Carl D. Jackson, "Will the Commissions Regulate Stock Exchange Prices?" *PUBLIC UTILITIES FORTNIGHTLY*, November 28, 1929.

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determine reasonable rates and any activity that does not pertain directly to this function is, as it were, *ultra vires*.

(2) The United States Supreme Court has decreed the method and principles that should govern rate regulation and any methods and principles which do not scrupulously follow the Supreme Court are taboo.

My contention is:

(1) That the Supreme Court has not ordained one and only one method of arriving at non-confiscatory rates.

(2) That the doctrine of confiscatory rates relates to the results of regulation, not the method alone.

(3) That many of the activities of the Massachusetts Commission, when we peer beneath the language, are merely a different method of reaching the result the Supreme Court is looking for; and as a derivative of this point, that many features of the control of securities which are condemned by some critics do pertain, directly or indirectly, to the control of rates.

Let us examine some of these propositions, which, I would emphasize, relate to avoidance of confiscation in the legal sense. I shall not deal here with the methods and results of Massachusetts regulation judged on other grounds.

THE valuation opinions of the Supreme Court, from *Smyth v. Ames* to the *O'Fallon* Case, are much plowed ground, and it is not necessary to harrow this ground intensively again. The classic statement in *Smyth v. Ames* was inclusive, not exclusive, and specified the following as "matters for consideration":

1. "The original cost of construction."
2. "The amount expended in permanent improvements."
3. "The amount and market value of its bonds and stock."
4. "The present as compared with the original cost of construction."
5. "The probable earning capacity of the property under the particular rates prescribed."
6. "The sum required to meet operating expenses."

These factors and perhaps others, the court added, "are to be given such weight as may be just and right in each case."

As I read this and subsequent valuation opinions of the Supreme Court, this "inchoate rule" still stands. Subsequent cases only confirm the view that a valuation based on only one of these factors, to the exclusion of all others, is clearly invalid but that a valuation which gives consideration to all these factors, with the possible exception of No. 3, is not invalid merely because it fails to give 100 per cent weight to present prices.

THE war-time price revolution made an issue of a utility's right to realize the appreciation in the value of its assets. And this has been the major bone of contention in recent cases. But two features of these cases seem to be largely overlooked by Dr. Barnes and Mr. Jackson.

First, almost without exception—and Massachusetts is a partial exception—the regulatory Commissions have ascertained original costs or present values by looking at the physical and intangible property represented on the assets side of the balance sheet. Lacking confidence in the account books and capital set-ups of the

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companies, they have laboriously gone through an inventory and appraisal of the items shown as assets.

Again, it must be remembered that the Supreme Court in these cases is a reviewing body,—it is constrained to scrutinize the methods used by Commissions and lower courts. It passes judgment on these methods and not on some other possible methods of arriving at non-confiscatory rates.

Because of the price revolution most of the controversy over the valuation of assets before Commissions and courts has centered on the question of original cost as compared with present value in computing the rate base, and specifically on the weight to be accorded present prices. Yet of the various methods used by Commissions to give weight to "present prices," the court has adopted no one of them as absolutely controlling. In the same term the court has disapproved an historical cost valuation because it "wholly disregarded" 1920 prices; disapproved a split-inventory appraisal because the bulk of the property was denied the benefit of 1919 prices and, finally, approved the refusal of the Commission to base its valuation solely on "replacement cost."

A GAIN in the Indianapolis Case, which has been most often cited as approving full rights to appreciation, the court registered preference for the lower court's valuation, using spot prices as of January 1, 1924, over the Commission's 10-year average of prices ending in 1921. What the court would have decided as between 1924 spot prices and a 3 or 5-year average of prices including the

high-price year of 1919-1920 is, of course, problematical, but, recalling the two available choices before the court, it is significant to note the following comment of the majority:

"But this (present as compared with original costs) does not mean that the original cost or the present cost or some figure *arbitrarily* chosen between these two is to be taken as the measure. The weight to be given to such cost figures *and other items or classes of evidence* is to be determined in the light of the facts of the case in hand." (Italics mine.)

Finally, last spring the court disapproved the Interstate Commerce Commission's valuation for recapture purposes based on a "split-inventory" appraisal in which the bulk of the assets were priced at 1914 levels. Yet, even so recently the court expressly disclaimed determining what weight should be accorded higher prices.

In short, I do not find in these landmark valuation cases any ruling that one and only one method of ascertaining a rate base will avoid confiscation or that such a method, if there is one, should dominate to the exclusion of other considerations. The farthest reach of the rulings has been that some consideration and weight must be given, on a rational basis, to the appreciation of assets resulting from the price revolution and each case must stand on its own bottom.

NOW there is more than one way of giving effect to present prices and there is more than one way of finding out the amount of property devoted to public use by private owners. Both Dr. Barnes and Mr. Jackson rightly point out that the Massa-

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chusetts Commission, in regulating rates, derives a rate base from the liabilities side of the balance sheet, and they seem to deduce from court cases that effect can be given to present prices only by an inventory and appraisal of assets. But they overlook or underweigh what the Commission has done before and after supervising the amount and price of security issues.

In short, the Massachusetts Commission uses the valuation of liabilities rather than of assets method because previously, in security issue cases, it has audited the property accounts and because subsequently, through the rate of return allowed on approved liabilities, it can give effect to present prices.

That the Massachusetts practice in controlling security issues amounts to a periodic property audit can be seen if the procedure in such cases is noted. When a utility company expands or betters its property, ordinarily this is financed in the first instance out of

short-term borrowings, accumulated and unappropriated surplus, working capital, or reserves.

The time may come, however, when the management deems it appropriate to have these property additions refinanced by or reflected in permanent capital liabilities. A petition to this effect is filed with the Commission and accompanied by exhibits showing the amounts spent for those additions which have not already been represented by permanent liabilities, and how the company proposes to use the money received from sale of the securities petitioned for.

The accountants of the Commission go over these exhibits, sometimes inspect the properties said to be added, and even, on occasion, obtain the judgment of engineers. The result of this inspection of accounts, work orders and vouchers, and property is a recommendation to the Commissioners of the prudent costs of additions which have not already been matched by stock or bonds.

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AT a time of rapid expansion or modernization, such as electric and gas properties have recently experienced, issues of securities are petitioned every two or three years, sometimes even more frequently. At least they would usually occur more frequently than would a rate case.

It follows, therefore, that when such rate cases do occur, the Commission has conveniently at hand a more or less up-to-date audit of what the company has received from its permanent investors and what it has paid out for property additions and non-recurring expenses. Moreover, since this process has been followed ever since 1894 and from an earlier date in the case of some types of utilities, the Commission has reasonable confidence that the approved outstanding liabilities represent properly capitalizable property additions. Can it, therefore, be blamed, lacking an adequate engineering staff for comprehensive inventories and appraisals in each rate case, for taking the approved liabilities as the equivalent of property valued at original or historical cost?

THE usual next step of the Commission in a rate case is to scrutinize operating expenses, depreciation charges, interest payments, and dividends paid. Not only are these items examined in retrospect, but also in prospect as related to the proposed or possible rates. The influence of high prices is taken into account in this process of determining the amount of revenues reasonably necessary to cover operation, depreciation and surplus, interest charges, and dividends. Interest payments to long-term bondholders are, of course,

governed by the contract and are most rigid in the face of wide price fluctuations, even under the cost of reproduction standard. The pivotal point, in making allowance for present prices by the Massachusetts method, is, therefore, the amount of revenue allowed for dividends—in short, the control of dividends.

Mr. Jackson is perfectly right in saying that in Massachusetts the control of dividends in the sense of control of earnings is an integral part of regulation, and, I would emphasize, of rate regulation. But control of dividends does not mean that dividend rates and payments have to have prior sanction of the Commission. The theory implicit in the laws and Commission practices seems to be that the owners of these properties are given exclusive rights in public ways; they are protected from a considerable degree of competition in the territories served—at least so far as residential and commercial lighting and heating are concerned and this portion of the market yields the lion's share of the revenues; and the Commission stands in the gateway to curtail unreasonable profit-taking by the owners from dependent consumers.

MASSACHUSETTS is not alone in these principles. Other State Commissions limit earnings—and hence affect stock prices—though by methods somewhat more roundabout and indirect than the direct practices here described. The directness of the Massachusetts method results chiefly from breaking down a company's capital structure and concentrating attention on the return upon stockholders' equity. Not only is this re-

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turn upon equity of supreme importance to management representing stockholders; it is also the item of greatest flexibility and of greatest managerial discretion.

THE control of dividends in Massachusetts has been particularly important, and influenced by certain gaps in the Commission's powers over rates. This phase has been minimized by the critics of the Department. Until 1927, the Commission in that state did not clearly have the power to initiate gas or electric rate proceedings on its own motion. As Dr. Barnes has described, petitions for changes in rates could come from twenty customers, the mayor or selectmen of a city or town, or from the company. In the former class of complaints—customers' complaints—the maximum price of gas or electricity fixed by the Commission could not be increased without prior Commission approval; in the latter class of complaints—company complaints—the rates fixed by the Commission could not be changed up or down without prior Commission approval.

Aside from the Commission's interpretation of the statute that, on customer complaints, it only had jurisdiction over maximum lighting rates, there were inequalities in the Commission's rate powers which were strikingly revealed during the period of war-time prices. When operating expenses swiftly mounted and encroached on revenues, one group of companies which had never had their rates fixed by the Commission could adjust their rates to the new price levels without the delays incident

to securing Commission approval.

Another group of companies which had once had a maximum rate fixed by the Commission on a customer complaint could freely move up maximum rates to the Commission-determined maximum without prior Commission approval; these companies had a considerable margin of flexibility, depending on how far below the Commission-determined maximum their then existing rates were.

A third group of companies, having themselves petitioned for a rate determination, could move their rates neither up nor down without the Commission's stamp of approval; these companies had the least amount of flexibility in the face of rising prices and costs.

Since dividends can be directly limited only through curtailing revenues by a rate adjustment, and since the Commission's power to effect such a rate adjustment was restricted as above outlined, the direct control over dividends was comparatively slight, however desirous the Commissioners might be to curtail excessive profit-taking. This fact was pointed out in the address of Governor Alvan T. Fuller to the legislature in 1927. This slight control, supplementing the Commission's partial powers over rates, arises, apart from rate cases, from the Commission's power to fix or review the price at which securities shall be issued.

I THINK that both Dr. Barnes and Mr. Jackson underrated this aspect of dividend control in relation to rate regulation.

This power to review the issue price means more than merely controlling

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capitalization in relation to assets; it has a bearing upon the gain accruing to stockholders in the form of valuable subscription rights.

If earnings on stockholders' equity are permitted to grow unchecked by Commission action in a rate case, the market price of stock in such a company is almost certain to rise. Under these circumstances, even though stock dividends are prohibited, the directors have the power in issuing additional stock to grant very valuable stockholders' rights, unless restrained by prudence or a requirement of issuance at a premium. The premium policy in Massachusetts signifies an attempt to retain in the corporate treasuries the appreciation caused by unchecked earnings. Conversely, it means a limitation of the value of stockholders' pre-emptive rights.

This is a regulation of profits, to be sure, or at least a regulation of capital gains accruing to stockholders. And Mr. Jackson may be right in objecting to it as an undesirable invasion of owner's prerogatives.

But the point should also be made that this premium control policy grew in part out of the prohibition of stock dividends and out of the incomplete power over rates. The significance

of premium control in Massachusetts regulation is accentuated by the fact that since 1894 at least, stockholders of gas, electric, and carrier companies have had pre-emptive rights, where the issue of new stock exceeded 4 per cent of the outstanding stock. Furthermore, tax laws, and more recently investors' fashions, have so encouraged stock financing that the capital structures of Massachusetts utility companies are heavily weighted with stocks.

How has this control over issue prices operated? Has it embarrassed the companies by discouraging investment? Has it prevented the companies from receiving a non-confiscatory return? What do the data on issues at a premium reveal as to the profitability of these companies? For if a considerable number of companies can successfully market stock at a premium, this tends to indicate that the earnings position of these companies is keeping abreast of financial market sentiment. The evidence is not complete, it is true, but there are some pertinent indications.

Although the Commission, from 1894 to 1908-9, was required by law to determine the market price of stock issues (and was embarrassed to find



Q“MASSACHUSETTS is not alone in these principles of regulation. Other State Commissions limit earnings—and hence affect stock prices—though by methods somewhat more roundabout and indirect than the direct practices here described. The directness of the Massachusetts method results chiefly from breaking down a company's capital structure and concentrating attention on the return upon stockholders' equity.”

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such value for stock held closely either by holding companies or individuals), it was almost obliged to try to fix a price which would give enough value to the rights to induce subscriptions. Nevertheless, Professor Bullock, after investigating this law, felt that it discouraged investment in Massachusetts utilities.³

Since 1909, the Commission has had only reviewing power over security issue prices. Between 1914 and 1921, 83 gas and electric companies had security issues approved, and 41 of these companies issued stock at a premium.

Figure I shows that during the same years in less than half the issues approved was a premium price authorized. It also indicates the generally favorable response of stockholders except during the difficult war and post-war years. Comparing aggregate amounts (par value figures), 17 per cent of the par values of approved issues were not taken by stockholders.

Figure II summarizes the response to the 67 stock issues offered at a premium. The effect of war conditions is again striking and to divide the responsibility between the war and the Commission's premium policy is difficult. Yet even with half

the period so unsettled, almost half the premium issues were subscribed *in toto*. The year 1920 was extremely unsettled in financial annals. But in the case of 10 of the 11 premium issues approved in that year, more than half of each was taken by stockholders and of the balance of these 10 issues some were auctioned at a premium. It is also interesting that during this 7-year period, 24 issues were not fully subscribed by stockholders; but stockholders took more than half of these issues and a like number (17) were offered at a premium price.

Unfortunately, complete information is not readily available for the years since 1921. From data on hand, about half of the gas and electric stock issues petitioned were approved at a premium price. Information for the largest retailer of electricity in the state, all of whose issues from 1913 to 1928 were at a premium, discloses less than 1 per cent of the shares not taken by stockholders.

From 1914 to 1928, the Commission raised the directors' proposed prices of utility security issues in 29 cases. This upward revision varied from $2\frac{1}{2}$ points on stock proposed at 27.50 to 45 points on stock proposed at 130. Three issues at around 200 were boosted 25 points.

THIS evidence, as far as it goes, does not seem to indicate any tendency on the part of the Commission to "bear down hard" with its power to review issue prices and compel the payment of premiums.

This conclusion is fortified by the Commissioners' statement, on more

³ Professor Bullock concluded that under the anti-stock-watering laws of 1894 "issues were usually authorized at prices a little less than those of the last recorded sales, but only enough less to allow for the natural effects of the increase of the stock. . . . Sometimes they (the Commissioners) fixed prices that made stockholders' rights fairly valuable and enabled the issues to be fully subscribed but at other times they named prices that proved prohibitive. . . . No complete data are at hand for gas and electric light companies, but it appears that stock issues were fully subscribed in some cases at the prices fixed by the Commission, and that in a few instances prices were placed so high that issues were not taken by stockholders."

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Year	Total number of issues appd.	Number of issues appd. at Prem.	Number taken by Stock- holders		Number Auctioned	
			In Whole	In Part	In Whole	In Part
1914	23	11	20	2	0	1
1915	32	14	25	5	0	4
1916	21	8	18	2	0	1
1917	18	10	10	6	0	3
1918	18	5	15	2	0	3
1919	10	3	5	3	0	2
1920	26	11	6	16	1	7
1921	14	5	1	4	0	2
Totals	162	67	100	40	1	23

FIGURE I

This table shows that during the 1914-1921 period, in less than half the gas and electric security issues approved was a premium price authorized; it also indicates the generally favorable response of stockholders except during the difficult war and post-war years.

than one occasion, that the necessity of approving the premium price embarrassed them in regulating rates, because they felt a moral obligation to permit rates and revenues which would maintain the last issue price. In brief, whatever may be the potentialities of their power to review stock issue prices, as a supplement to incomplete power over rates, it does not appear on the whole to have been exercised so as to discourage stockholders from risking more capital in these enterprises.⁴

⁴Dr. Barnes also criticises the Commission for encouraging the reinvestment of earnings and for recognizing a sort of equitable interest of ratepayers in such investments. He cites Massachusetts and United States Supreme Court cases to show that reinvested earnings are stockholders' property. As I interpret the Massachusetts practice from what was done, not what was said, in the cases, reinvested earnings are used in favor of the customers only when the company has also been collecting excessive earnings and paying exorbitant dividends. When, as in the Springfield Railway Case, cited by Dr. Barnes, reinvested earnings are a sign of inability to raise new capital by security issues on account of small dividends, the Commission did not allow the existence of such reinvested earnings to block the company's proposed fare schedule.

Now, how does this regulation of security issues and dividends tie up with the question of giving effect to present prices in rate making? If the rate base used by the Massachusetts Commission is virtually equivalent to original or historical or prudent cost and the Commission does not allow earnings sufficient to pay high enough dividends to offset in large measure the higher commodity prices prevailing, then the Commission-determined rates are confiscatory in the Supreme Court sense. On the other hand, if the rates permit earnings enabling the payment of dividends ample enough to attract capital to these enterprises, as indicated by ability to market stock at par or above, the Massachusetts methods achieve the result intended by the Supreme Court.

In seeking evidence on the earnings allowed, these peculiarities should be kept in mind:

(1) Instead of determining allowable earnings by figuring a fair "overall" return on "value of property,"

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the Massachusetts Commission breaks down the capital structure and estimates the earnings needed to pay interest charges and dividends separately. In short, attention is focussed on the return upon stockholders' equity.⁸

(2) Because of the premium policy, the proper gauge of reasonable dividends is not the dividend rates on par but the dividend rates on par plus

⁸ Commissioner Henry G. Wells described the process as follows:

"We have disregarded valuation entirely. It doesn't take us two or three years to determine a rate case; it takes us from a month to possibly two or three months. And we simply take the economic situation of the company. If the company's stock is selling at about par, if they are paying dividends and the stock commands a premium on the open market, if they are setting aside adequate depreciation and a reasonable surplus, then the only fact that we have to consider in a rate case is whether the operating or maintenance charges are being increased or decreased as a result of market prices, and that is all there has been to it since 1919 until we had the Worcester Electric Light rate case. It is a perfectly businesslike proposition." Proceedings National Association of Railroad and Utilities Commissioners, 1927, p. 114. Compare analogous language of Mr. Justice Sutherland speaking for the majority in *United Railways & Elec. Co. v. West*, 280 U. S. 234 (1930).

premium (stockholders' contributions).

This is in line with the Commission's practice.

(3) The permanent capital structures of gas and electric companies consist more largely of stock than is the case with most companies in these industries.

In brief, trading on the equity is less general.

(4) The prohibition of the issuance of stock at less than par, except in rare, special cases, makes the Commission especially sensitive to the ebb and flow of the financial markets. Through securities markets the influence of changing business conditions (and prices) makes itself felt on dividends sooner than from commodity markets, changing prices impinge on assets. Moreover, the large amount of stock financing tends to accentuate this sensitiveness and also tends to minimize the difference between the rate of return on equity in comparison with an overall rate of return.

Year	and	No.	TAKEN BY STOCKHOLDERS			AUCTIONED			UNISSUED		
			In full	More than half	Less than half	Whole	More than half	Less than half	Whole	More than half	Less than half
1914	11	8	2	0			1	1		1
1915	14	10	4	0			3	0		
1916	8	7	0	0			0	1		
1917	10	3	2	3		2	1	2		4
1918	5	3	1	0		1	1	0		1
1919	3	0	2	0			2	1		
1920	11	0	10	1			5	0	1	5
1921	5	1	1				1	3		
Totals	67	32	22	4	0	3	14	8	1	11

FIGURE II

This table summarizes the response to the 67 utility stock issues offered at a premium. (Complete information for the years since 1921 is not available.)

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YEAR	GAS COMPANIES		ELECTRIC COMPANIES	
	Ratio of surplus and depreciation reserve:		Ratio of surplus and depreciation reserve:	
	to par plus premium	to stock and funded debt	to par plus premium	to stock and funded debt
1918	15.6%	17.2%	10.0%	9.0%
1919	14.8	14.0	10.4	9.3
1920	15.8	14.7	13.0	11.7
1921	16.7	15.1	14.1	12.5
1922	16.7	14.4	16.2	12.1
1923	20.0	17.3	18.4	14.4
1924	21.8	19.1	20.0	16.2
1925	23.4	20.8	20.5	15.5
1926	25.4	22.6	20.6	15.7
1927	30.3	24.5	22.5	15.4
1928	30.4	25.3	25.7	20.4

FIGURE III

In the above table showing the accumulated surplus and depreciation reserve is indicated the percentage of stockholders' capital contributions and of stock and funded debt capital.

IN view of these considerations, have the utilities been allowed, if they can earn, revenues sufficient to pay attractive dividends, meet all legitimate charges, and maintain their credit, even with the use of an investment rate base? There are several lines of evidence. Take first the dividend payments of gas and electric companies as a group. The results of surveys show that the average dividend rates on par and on par plus premium, where ascertainable, of those gas and electric companies paying dividends ranged as follows: On par, 7.93 per cent in 1920 for gas companies alone to 11.13 per cent in 1928 for gas and electric companies combined; on par plus premium, 5.7 per cent in 1920 for gas companies alone to 8.33 per cent in 1926 for gas and electric companies combined. Dividend payments of both types of companies ranged from 6.42 per cent in 1918 to 8.03 per cent in 1926 on par plus premium. As to the companies passing dividends, a check was

made for 1921, a year of rather poor business. Only three of eleven gas companies passing dividends in 1921 had total assets in excess of \$400,000, and of these three, one was a gas and electric company which showed a sizable profit on the electric business. Of six electric companies that passed dividends in 1921, only one company had total assets of over \$100,000.

It appears reasonable to suppose that most of these companies which failed to earn enough to pay dividends were in marginal territory and so small that dividends would have been passed even if the reproduction cost rate base had been used.

But in order to narrow the margin of error, let us examine another line of evidence—the percentage of accumulated depreciation reserves to book values of plant and equipment. Here, for illustration, is a small table of such data.

(See Figure IV, at the top of the following page.)

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FIGURE IV

YEAR	PERCENTAGE	
	Gas	Electric
1918	4.27%	3.01%
1919	4.37	2.94
1920	4.72	4.33
1921	5.17	4.68
1922	5.29	5.67
1923	6.72	6.70
1924	7.33	8.33
1925	8.28	7.96
1926	9.20	8.66
1927	10.00	9.55
1928	10.58	10.52

Clearly these are not large reserves, even considering that land is included in plant and equipment. It is known, however, that some companies do not earmark surplus earnings for the depreciation reserve. Consequently, in the accompanying table the accumulated surplus and depreciation reserve (Figure III) is given as a percentage of stockholders' capital contributions and of stock and funded debt capital. The margin here is at least comfortable. Indeed, the percentage of gross gas and electric revenues available for dividends, depreciation and surplus ranged from 14.2 per cent in 1921 to 26.3 per cent in 1928. Earnings were fairly liberal, even during the difficult war and post-war years. Witness the facts that gross revenues since 1918 increased faster than ledger values of plant and equipment and that on an index basis gross revenues of electric companies by 1928 had risen 196 points over 1918, plant and equipment 162 points, and surplus earnings before dividends and depreciation 273 points.

ALL these figures fail to tell the whole story because they lump together the experience of well- and poorly-managed companies and of companies situated in favorable and

unfavorable territory. Moreover, it is impossible from such figures to segregate precisely the results of Commission liberality or stinginess and managerial proficiency or ineptitude.

I have further considered similar data for three companies which have had rates determined by the Commission since 1925. Two of these companies—in Worcester and in Cambridge—carried the Commission's rate orders to the Federal court; in the case of a third company in Boston, to use the words of a disgruntled stockholder after the Commission recently refused to permit a change of par value, "everything had been done to dispossess the company's present owners outside of having Governor Allen call out the militia and take it." Surely, then, these three companies will indicate the extremes to which the Commission carries its authority. The income before dividends per share of \$100 par varied from a low of \$10.44 in 1921 for one company to \$47.68 in 1927 for another company. The year after the Cambridge and Worcester rate orders, income per \$25 share, before dividends, was \$9.04 and \$11.37. Dividend rates of all three companies ranged from 6.7 per cent on par plus premium to 27.2 per cent. Moreover, in 1928 the accumulated surplus and reserves amounted to 72 per cent and 52 per cent of property accounts of the Worcester and Cambridge companies. Yet despite the Commission's so-called use of the "investment" rate base, the stockholders of the Worcester Company sold out to the New England Power Association last year on the basis of \$226 a share, the stockholders of the

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Cambridge Company similarly received a premium from the Associated Gas & Electric Company, and the price of Boston Edison stock has been as high as \$440 a share, and even today is 25 points above the last Commission-determined issue price.⁶

ON the basis of all the foregoing evidence, the Massachusetts methods of regulation apparently have not prevented the companies from earning, under reasonably capable management, a return well abreast of the requirements of investors at present prices. In short, the Massachusetts method appears to reach the

⁶Objection may be taken to the use of gas and electric companies in this analysis, when, significantly, the Supreme Court rulings have been derived chiefly from cases involving other utilities. Yet the companies use their interpretations of these rulings in contesting all types of cases before Commissions. And even assuming the correctness of the company interpretations of Supreme Court rulings in the marginal cases before it, a general indictment of a Commission's methods can not be founded on a failure to observe these marginal principles in one or a few cases. If the Massachusetts Commission is wholly disregarding "correct" Supreme Court principles, one would expect this waywardness to show up in other cases than merely borderline ones. Moreover, a tendency can be observed to "ride" the Commissions for results for which they are largely not responsible, an observation which applies not only to those who think Commissions are too harsh but also to those who criticize Commissions for being too lenient.

result intended by the Supreme Court in its valuation cases, though by a more direct and less expensive route.⁷ I might add that the severe strictures of the Supreme Court doctrine uttered by Commissioner Atwill should not be allowed to obscure the results reached by the Commission. There is more than one road to reasonableness.

Finally, so far as public confidence in the Massachusetts Commission is concerned, I think the opinion of a leading paper of that state, the *Springfield Republican*, summarizes the sentiment of most of its people:

" . . . The Massachusetts Public Utilities Commission enjoys public confidence as perhaps never before in its history. It has proved over and over again in recent years that it is not controlled by the public utility corporations. This demonstration, indeed, has given it an exceptional standing throughout the country. One need have no hesitation in saying that certain rate principles, corporate merger practices and financial set-ups which the commission has justifiably attacked contributed not a little to the immense inflation of the stock market which has come to a sad end within the past week."

⁷The writer is not concerned, in this article, with the merits of the question whether Commissions should or should not seek to protect investors' interests. One striking feature of the Massachusetts situation is that for years over four-fifths of the stockholders in gas and electric companies at least have been residents of the state.

Will the Public Utilities Become a Major Political Issue?

IT is increasing apparent that some of the politicians are seeking to answer this question in the affirmative—despite the pressure of other issues of more popular appeal but also more confusion—and conceivably more menacing—to both the Republican and Democratic parties. How the situation appears to interested observers will appear in the coming issue of PUBLIC UTILITIES FORTNIGHTLY—out July 10th.

Remarkable Remarks

BRUCE BLIVEN
Editor "The New Republic."

"The cure for propaganda is more propaganda."

•

L. A. LINCOLN
Editor, "Hardware Trade Journal."

"The power companies are in fact chain stores."

•

*The janitor of an apartment house
in Washington, D. C.*

"What this country needs is a good 5-cent kilowatt hour."

•

ERNEST DEAN MARTIN
*Director, People's Institute,
New York.*

"To be a genuine seeker after truth disqualifies one for the career of propagandist."

•

CHARLES GORDON
*Managing Director, American
Electric Railway Association.*

"Congestion of streets has become perhaps the greatest single economic problem confronting modern large cities."

•

FIGURELLA LAGUARDIA
*U. S. Congressman from
New York.*

"Any member (of Congress) who hasn't enough sense to operate a dial telephone ought to go out and get another job."

•

MORRIS LLEWELLYN COOKE
Engineer.

"Eventually we will be able to use electricity with as little thought to cost as we now give to the cost of water."

•

*A contributor to the
Vincennes (Ind.) "Sun."*

"If there is no such thing as telepathy, how does the long distance operator know just when you are in the bathtub?"

•

CHARLES A. EATON
*U. S. Congressman from
New Jersey.*

"We are fighting to free ourselves from economic slavery, and the great force in that struggle is the electrical industry."

•

THOMAS N. MCCARTER
*President, Public Service of
New Jersey.*

"I, too, receive suggestions. They range from ideas as to the form of generator to be used to the suggestion that the welfare of the state would be advanced if I quit."

•

EDWARD L. BERNAYS
Public relations counsel.

"During the last twenty years there has hardly been a single new idea, new invention, or new product accepted by the public which was not made available for the public's benefit through the use of propaganda."

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JOSEPH P. GROCE
Public relations expert.

"We who are engaged in the (utilities) industry and know personally the executives who are guiding the industry, realize that the idea of a heartless, soulless corporation is 'bunkum'!"

E. PAUL YOUNG
Investment counsel.

"I believe that the total amount of money invested by customers in preferred stock of public utilities corporations this year will triple the amount invested similarly in 1929."

MILTON R. STAHL
Chairman, Missouri Public Service Commission.

"It would be most unwise to permit Federal power to lay its hands on the regulation of our local utilities through the subterfuge of comparatively small interstate commerce in electrical energy."

EDWIN S. FRIENDLY
*Business Manager,
New York Sun.*

"Public utilities have been the football of political agitators for years. Probably there is not a legislature or assembly meeting in the United States in which the control of public utilities is not fought over."

T. J. SMITH
*Editor, "So The People
May Know."*

"The many investigations by Congress of the evils of the Power Trust has brought home to the people the solemn fact that utilities have a racketeering game rivaling Chicago."

MARK SULLIVAN
Political writer.

"Today we are regulating the railroads, not in the direction of restraining them, but in order to let them live. Today, instead of forbidding railroad mergers, we are commanding them, insisting upon them, by law."

MATTHEW S. SLOAN
President, National Electric Light Association.

"If our customers, the great general public, believed half of the charges, our industry would be in a bad way. And if one-tenth or one-hundredth of the charges were true, both the industry and the public would be in a bad way."

ERNEST H. CHERRINGTON
Anti-Saloon League official.

"It is too often found that the lobbyist representing special interests, backed by vast wealth, is received and regarded with peculiar respect, while the man or woman who represents nothing more than a social welfare movement is viewed as irritating and troublesome."

BERNARD J. MULLANEY
President, American Gas Association.

"Any fair-minded and analytical examiner . . . will see that something more than 99 per cent of the so-called 'disclosures' of 'power trust' iniquity, as fed out to the public, have been misrepresentations and frequently falsehoods."



THE INEVITABLE

Regulation of the Taxi

For a long time the street car and bus operators have felt that the taxicab ought to be included in the regulation of transportation utilities. Now even the taxicab men themselves are beginning to think so. This article points out why taxicab regulation will be just as beneficial to the taxicab business as it will be to the other carriers.

By FRANCIS X. WELCH

Two kinds of transportation have developed in our large cities—the regular scheduled service and the private chartered service.

This distinction runs back to the time of the English stagecoach which was a regular transportation agency as compared with the liveried service rented out to a more exclusive clientele. Today we call these two classes of service "mass transportation" and "chartered transportation" respectively. The first is a necessity; the second is a luxury.

UNTIL a few years ago the mass transportation of our large cities was taken care of by street cars, then the busses traveling between fixed terminals on scheduled time.

Now a new arrival has entered the field—the taxicab.

The taxicab, before its recent advent into the realm of mass transportation, was usually associated with the other kind of service—the chartered service. That idea of one class of carriers traveling between fixed destinations and the other class controlled by special contract with an individual customer was the legal difference that separated the taxicab from the bus. But there was another and more powerful difference—the difference of economies. Before the war, busses and street cars charged from 5 to 10 cents a trip; taxicabs charged on an average of \$1.50 per trip—and around \$2.50 for hourly service.

With the growth of automobile production and operation, the bus grew into a real adversary of the street car. Finally bus operators began to

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cut so heavily into the revenues of street railway companies (which were already depleted by the loss of business caused by the private automobile), that city-wide rail systems were threatened. The bus did not offer a comprehensive city-wide service and could not render it even if it attempted to do so—at least as well or as cheaply as the street cars did.

THE old bus carrier was frequently an irresponsible fellow. His routes changed with his mood. If it was too cold or too rainy, he did not go out at all. He made money by capturing the cream of the short haul street car business over its more prosperous routes during the rush hour. Of course, operating for 5 cents, he usually loaded up his open Ford or other light touring car and often during the slack hours he followed his more regular business of plumbing or pants pressing.

Such a situation could not long continue. It was economically unsound. It was unsafe. It was unfair to the existing transportation systems, to the public, and to the drivers themselves, who were often too inexperienced to figure out the real cost of their service, including fixed charges and depreciations. Even had one or two of these unregulated bus drivers been shrewd enough to put his route on a sound basis, using safe equipment, rendering adequate service at reasonable rates, his business would have died amid the fierce cut-throat competition of the unregulated throngs that crowded the field.

It was a survival of the fittest, or, more accurately, a survival of the fittest—the fellow with the most re-

sources starving out his less fortunate competitor. Regulation was needed and needed badly.

WHEN regulation did come to motor transportation the law followed this natural division between regularly scheduled agencies and chartered service. The result was that the taxicab escaped regulation, while the bus fell under it. The legal line fell squarely across the economic margin that divided the jitney bus from the \$2.50 an hour taxi.

That was before the war. But now where has such a policy brought us?

The economic margin between the taxicab and the regular carrier has shrunk year by year, cab fares getting lower and car fares going higher, until today it is practically nonexistent. Since the arrival of the cut-rate cab, it is actually cheaper for a party of four people to ride in one, in the average American city, than it is to ride on the street car and the bus. In other words, the economic difference between the taxicab and the jitney has practically disappeared. Only the legal difference remains. The busses are regulated while the taxicab industry is engaged in a life and death struggle of unregulated competition.

LESS than a month ago, the Diamond Company in Washington, D. C., announced a 35-cent flat rate within the city lines of the District of Columbia. The Yellow and Black and White Cabs are still holding to meter rates at this writing, but how long they can sustain their position is problematical. On the heels of this comes a statement by the Washington street car companies to the effect

The Crisis in Transportation Precipitated by the Unregulated Taxi

"THE present situation is bad for the established carriers who have millions of dollars on investment literally spiked to the ground in steel rails. It is bad for the public because taxicabs could not possibly furnish a comprehensive system for mass transportation at anything approaching a comparable rate, if they should succeed in driving the regular carriers from the field. And what is most important to the taxicab operators, it has the worst possible effect on their own destinies. Their service is kept unstable. Their rates are vacillating, causing an adverse reaction on the part of the public. What the taxicab industry needs most of all next to regulation is public confidence, and it will never gain it by rate wars."

that during the year of 1929, they lost \$1,700,000 "due entirely to taxicab competition." These car companies at first expected the cut-rate taxi to cut its own throat but in their May 25th statement they confess that they have underestimated the staying power of the cut-raters. We have seen, only recently, attempts at a flat 15-cent rate in New York city. In other words, it is a fact of common knowledge that the taxicab industry today is passing through the most critical stage in its existence.

The present situation is bad for everybody. It is bad for the established carriers who have millions of dollars on investment literally spiked to the ground in steel rails. It is bad for the public because taxicabs could not possibly furnish a comprehensive system for mass transportation at anything approaching a comparable rate, if they should succeed in driving the regular carriers from the field. And what is most important to the

taxicab operators, it has the worst possible effect on their own destinies. They are never safe from the savage attack of a more powerful competitor. Their service is kept unstable. Their rates are vacillating, causing an adverse reaction on the part of the public.

What the taxicab industry needs most of all next to regulation is public confidence, and it will never gain it by rate wars.

BUT let us go back again to the time when the jitney bus was put under regulation in most states. There is a parallel that should set taxicab men thinking hard.

With the coming of regulation the bus business was put on a sound basis. The State Commissions refused to permit any more operators over any given route than public convenience and necessity required. But once a bus operator secured Commission approval, he also received Commission

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protection—protection from competition.

He was allowed—nay he was compelled—to charge a rate that was reasonable not only to the public but also to himself. From 1920 up to the present writing, there are reported, in "Public Utilities Reports," over 200 cases where State Commissions have refused to let bus carriers cut their rates. Every operator's rate is kept at the same level. Every operator is given the same chance and every route is backed by all the authority of the state.

True, this policy left a good many dissatisfied customers. The number of applications for certificates to operate bus routes which have been turned down by the State Commissions runs into the thousands, but this did not affect the bus operator who had a right to be in the field for whose service there could be proven a reasonable public demand.

WHAT has been the net result of regulation to the bus industry? Today it is a business that enjoys the confidence and favor of the public. Bus lines stretch across our Nation from coast to coast. Regulation has put them for the most part on a paying basis. Many operators have enlarged their service. Many have joined forces at a profit with street railway and even railroad companies. Better service to the public from bigger, better, and safer equipment has resulted. I doubt if there is a single bus operator, who has a paying business, who would be willing to go back to the old era of competition. Commission regulation to him is just what a franchise is to a gas or electric com-

pany—a guarantee that he will get fair treatment as long as he gives it to his patrons—a bond of protection signed by the Commission and endorsed by the state.

The history of bus regulation, dwelt upon here, should be a lesson to the taxicab industry if it has the future of its own business at heart. The parallel between the taxi and bus is almost absolute—with this difference; the taxicab has only lately entered the field of mass transportation just as the jitney bus did ten years ago. It is passing through the same sort of a crisis due to open competition that the bus business passed through ten years ago.

Why is it not the logical step to try regulation which has proven so effective in solving the problem of the jitney bus?

COMPETITION was the very earliest form of regulation for all utilities in this country. It proved to be bad in the case of every public utility because it too often meant the duplication of facilities in a field not large or rich enough to support more than one company. The usual outcome of this was consolidation. The little fish were gobbled up by the big fish—and this in turn was followed by recoupment in the form of higher rates for losses due to competition.

"Whatever may be the value of competition as a regulation of charges in other lines of business," says Mr. Henry C. Spurr, editor of "Public Utilities Reports," "it proved to be a failure in the public utility industry. It was a long time before this was understood and, even now, it is not generally appreciated by the public."

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One by one the utilities have fallen under the scope of public regulation, and in every case they have prospered accordingly. The taxicab alone of all public utilities remains unregulated except in two states.

IN Pennsylvania, the Commission has exercised its rate jurisdiction very sparingly, yet the taxicab situation in the Keystone State is probably better than anywhere else in the Union. Only a few months ago the Pennsylvania Commission refused to authorize competitive taxicab service in the city of Philadelphia. The rates of taxicab operators in Philadelphia, Pittsburgh, and Harrisburg are more reasonable and the wasteful rate wars have abated. In Rhode Island, the Commission has not yet had jurisdiction long enough to show a fair trial of Commission regulation, but already the competitive situation in Providence has cleared up, and duly authorized taxi operators in that city are doing well.

WHAT sort of regulation can be applied to the taxicab?

Unfortunately a decision of the United States Supreme Court in 1916 divided the taxicab service into two classes. The case was called *Terminal Taxicab Co. v. Public Utilities Commission* (P.U.R.1916D, 972) and has been regarded by some as the *Dred Scott* decision of taxicab regulation. It stands as an obstacle

in the way of perfect taxicab regulation.

The decision, in a word, held that a taxicab operator soliciting business on the street or in public places is a public utility subject to regulation, but on the other hand, that a taxicab operating out of a garage upon special call was a chartered or livery service and not subject to public regulation.

Now the important effect of this decision has been that the Commissions, even if given proper statutory powers by the respective states, are unable to control that larger number of taxicab operators who respond to telephone calls. In many cities, this type of business constitutes a larger portion of the total taxicab operations.

Of course, the Commissions can and do whittle away at the extent of this doctrine. The Pennsylvania Commission, for instance, in *Rinebold v. Webb* (1927) (P.U.R.1928A, 604) held that public display of a sign on the front of a so-called "livery garage," as well as extensive advertisement through telephone directories, was a "solicitation" to the extent necessary to put the operator into the first group.

But Commission rulings such as these have yet to stand the acid test of the Supreme Court's review. However, there is hope that the highest court will reverse itself in this question when it is again presented. Times



The decision of the United States Supreme Court in the case of the *Terminal Taxicab Co. v. Public Utilities Commission* has been regarded by some as the "*Dred Scott* decision of taxicab regulation." It stands as an obstacle in the way of perfect taxicab regulation.

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have changed a great deal since 1916; the automobile has multiplied so rapidly that what seemed a private calling in 1916 may appear to have a much more vital bearing upon public interest today. The Supreme Court has reversed itself before. There is a good chance that it may do so again. At any rate, if only modifications of this rule, such as that sought by the Pennsylvania Commission, are endorsed, the regulation of taxicabs will be better protected.

As a matter of fact, the number of telephone service cabs appears to be due for an increase. Traffic congestion has caused the cruising taxi to come into great popular disfavor. A traffic count during a rush hour at 42nd and Broadway, in New York city, April 15, 1930, revealed the astonishing fact that 70 per cent of the traffic was taxicabs and that 60 per cent of the taxicabs were empty.

The public will not long stand for this valuable highway space of our large cities to be given over to the useless peregrination of the "cruising taxi." A leading traffic expert in Philadelphia predicts the day when the "cruising taxicab" will be abolished; when the taxicab business will be restricted to telephoned service plus central parking stations in downtown areas. This would compel the taxicab companies to purchase and maintain their own garages and terminals, and keep the cruising taxi off the street. Whether that statement is true or whether such a time is too far off to think about, the fact is that movement is already under way in seven large eastern cities—New York, Boston, Philadelphia, Washington, Baltimore,

Pittsburgh, and Buffalo—to restrict the "cruising taxi" to certain streets and to keep them off certain congested traffic arteries when unoccupied.

All of this goes to show that regulation of the taxicab, to be effective and comprehensive, must embrace all phases of taxicab service, whether patronage is secured by telephone or public solicitation.

ANOTHER factor that can be expected of full Commission regulation is a uniform rate—with due regard to the class of service rendered.

The Commission will recognize and permit a higher charge for a higher type of service, provided that there is a substantial demand for it. The Pennsylvania Commission has recently refused to rule that Model A Fords, for instance, were unfit for taxicab service. We may expect, if Commission regulation is given a chance, that small light cabs will be permitted to operate at a slightly lower rate than the limousine equipment, but only where the public shows a distinct need for both types of service.

Probably the best argument for Commission regulation from the standpoint of the taxicab man is the fact that it will permit the industry to expand naturally and smoothly along the channels into which economic forces have a tendency to place it.

WE have seen that the taxicab industry has moved steadily from the position of a chartered luxury to a real factor in mass transportation. The industry must bear this tendency in mind if it is to plan intelligently for the future. The taxicab will assume its proper and rightful place in our scheme of transportation service

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"We have seen the taxicab industry move steadily from the position of a chartered luxury to that of a real factor in mass transportation. The industry must bear this tendency in mind if it is to plan intelligently for the future. The taxicab will assume its proper and rightful place in our scheme of transportation service only by means of proper regulation."

only by means of proper regulation.

It will only injure the taxicab business to fight blindly against the street cars and busses. Even granting that these agencies do give up in any fair sized city before the assault of cut-rate cabs, the result would be a chaotic transportation situation that the taxicab operators could never take care of. If the regular transit agencies should ever be broken down by cut-rate taxicabs, the whole transportation field would be thrown open to a legion of independent operators lasting just long enough to ruin the game for everybody.

Over and above this, the streets of our cities are not large enough to contain the cabs that would be required to move the population in the absence of regularly scheduled carriers. Of course, such a situation is a very remote possibility, but it goes to show that there must be a more orderly way for the taxicab to take its place in the field of mass transportation. There is a place for it there—a place towards which the industry has been gravitating for the last decade. It is there and only there that the taxicab industry will attain the fullest flower of its development.

PROBABLY the greatest evidence of the public demand for taxicab

service as compared with the service of other passenger carriers is shown by the fact that in 1928, over 20,000 taxicabs operating in New York had an annual income of \$160,000,000. This means that for every \$1 spent for transportation on all other transit agencies in New York, including the subway, elevated, surface lines, and busses, \$1.02 was spent for taxicab service.

ALREADY there are plans under way for regulating taxicabs in New York. The number suggested by former Police Commissioner Whalen would be limited to the number of 20,000. If the uniform rate were placed into effect at 35 cents a mile, as suggested, the annual revenue, it is estimated, would be raised to \$210,000, an increase of \$50,000,000 over the 1928 figure. This would be the reward of regulation to New York cab drivers. No more worries about the next fellow cutting prices. No more worries about the field getting too overcrowded—an absolute guarantee of fair treatment in return for adequate service.

The established taxicab men deserve these rewards. They have been pioneers in the rendition of a service that saw many hungry days. They have served the public through wind,

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snow, and rain when regular transportation agencies have broken down.

THERE is one other point that should be emphasized; that regulation should be hastened before public opinion demands action so far reaching that the many operators will suffer.

The public is tired of the taxi wrangle. In New York city, Mayor Walker has already suggested that the city should lease out an operating franchise for all taxicab service within its boundaries to a single organization. This is typical of what threatens the industry unless Commission regulation is realized in the near future.

Let it be said, however, that the greatest good will come from complete regulation by a State Commission. Experience has proven that local regulation is unsatisfactory. Municipalities are apt to be more subject

to personal or political pressure than a State Commission. Furthermore, the great future that beckons the taxicab industry promises to grow over the narrow confines of municipal boundaries. A state-wide, comprehensive uniform brand of regulation—that is what the taxicab company requires to insure permanent, healthy, and unrestricted growth along sound economic lines.

THE first step is to secure the proper legislation in all states that empower the Commissions to take the existing service under their jurisdiction. The taxi men now in the field have everything to gain and nothing to lose by regulation. It will give them almost vested rights protecting them, not against each other, but as a group against the newcomer—the rate-cutter and the fly-by-night operator who now harasses the industry.

Why Rhode Island Regulated the Taxicabs

NOWHERE was the need for taxicab regulation more apparent than in the state of Rhode Island which has adopted a law, effective July 1, 1930, giving the Public Utilities Commission of that state full regulatory powers over this type of common carriage.

In September 1928, the "cut-raters" first made their invasion of Providence. A fleet of 35-cent flat rate cabs appeared, making a heavy raid on the business of the established taximen who were operating on a meter basis. Besides injuring street railway and bus revenues, the competition became so acute that the cabs raced the streets madly in search of business, adding to traffic congestion and endangering the lives of pedestrians.

To cope with this condition, the city adopted an anti-cruising ordinance. Then the meter cabs went over to the 35-cent rate. Next one large company adopted a 25-cent rate. In the wake of this rate war the 35-cent cabs were rented to drivers for as low as \$3.50 a day plus gas and oil. The 25-cent cabs were rented for \$3 a day plus gas and oil. By February 1, 1930, approximately 350 licensed cabs were in service in the Providence area.

The new law which goes into effect July 1st authorizes the Commission to "prescribe adequate service and reasonable maximum rates and charges, and prescribe and establish such reasonable rules and regulations with respect to fares, service, operation, and equipment as said Commission may deem necessary for the convenience, protection, and safety of the passengers and the public."

As Seen from the Side-lines

THE referee who can satisfy two disputants is a rare old bird indeed.

* * *

As evidence, go to a baseball game in Chicago on a Sunday, being careful, however, to wear a trench helmet as protection against the pop bottles hurled at the umpire.

* * *

THE gentleman who started counting over the prostrate body of Mr. Tunney and then got tongue-tied while looking to see whether Mr. Dempsey had gone to the proper corner—prizefighting is so formal, you know—has won for himself more epithets than Mr. Emmet's famous fisherwoman could conceive.

* * *

TAKE the case of the Massachusetts Legislature, just closed, as a bright and shining example.

* * *

MASSACHUSETTS, if you will know, is a sort of paragon of civic virtue in its dealings with regulatory matters over public utilities. In such matters it resolutely and sublimely refuses to accept the mandates of the United States Supreme Court itself. Not unearned increment and reproduction costs, but the actual dollars and cents prudently invested are the sole measure of dividends to be earned on rates charged to the faithful customers. So says Massachusetts; and there she stands by it.

* * *

SHE devoted meticulous attention to this matter of public utility regulation through her recent and lamented legislature. And what she did was a caution.

* * *

HAVING sat through long days and weary nights, Massachusetts put upon the statute books seven new laws designed to weave more tightly the elastic bands which bind the power corporations.

SHE found that the new device called the "holding corporation" was issuing stock in the state, stock guaranteed by holdings in primary electric companies, and she enacted a law which would place in the future all such issues under the bands and requirements of her Blue Sky Law.

* * *

SHE empowered her Public Utilities Department to examine the books and papers and documents and also the properties of the holding corporations which have gathered operating companies under their protecting wing.

* * *

SHE provided that all contracts for the purchase and sale of power between independent or affiliated corporations shall be open to the scrutiny and subject to the approval of the Public Utilities Department.

* * *

SHE set forth by law that all fees and emoluments exacted by management corporations for supplying aid, counsel, advice, or direction to power companies shall be approved, or disapproved as the case may be, by the same department.

* * *

AND, finally, so far as this session was concerned, she put into the law a provision that the same department shall decide whether it is in the public interest for a publicly owned and publicly operated power company to be taken over by a private corporation.

* * *

Now, it could not be said if truth were to be the guide, that the power corporations of this state were entirely and fully pleased by the enactment of those new regulatory powers. Regulation gone mad is a description of these acts which we can imagine being emitted by the public utility officials. We can see them biting their teeth (is that what they do?), chewing at their waxed mustaches, and saying to themselves, "What

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do we pay our boys on The Hill for?" when they read the latest digest of what happened under the gold dome in 1930.

* * *

BUT, take the other side of it.

* * *

THE advocates of more regulation and yet more look upon the legislature as being a venal sort of institution, manipulated, dominated, and influenced by the "moguls of State street."

* * *

THEY asked for a loaf; they believe they got only a stone. Their precious kick now is that the State Senate declined to adopt their proposal to enable municipalities more quickly and more effectively to establish lighting projects of their own. They complain that the cities and towns are ham-strung by existing law which compels them to take over a going concern, that is, a privately owned power plant, if it exists and if they desire to go into the business for themselves.

* * *

MOREOVER, they lament that this inept and unresponsive Legislature declined to enact an adequate law for whole-hearted regulation of the holding corporations. They denounce Governor Allen for his alleged lassitude; attack

the Senate for its alleged subservience to the power corporations and threaten to bring about the defeat of both in the biennial election shindy to be among the fixtures of early November. And we find as the spearpoint of this attack no less a person than John H. Fahey, former president of the United States Chamber of Commerce, a fact which gives the movement poise, respectability, and force.

* * *

It takes two viewpoints to make a battle, firm, unyielding differences. But it takes only one legislature to make an arbiter.

* * *

UNLIKE Solomon, this legislature had no child, no sword, and no heartbroken mother upon whose emotions to play. Even such monumental intellects as Kenesaw Mountain Landis and Will Hays might have been stumped under the circumstances. And they get seventy-five or a hundred thousand dollars a year and expense accounts to which they can resort as a source of comfort when the going is rough.

John T. Lambert

A Common Fallacy About Utility Rates

"**T**HERE is that white-whiskered old falsehood about extortionate rates to produce dividends on watered stock. It hobs up in all 'socialization' proposals and in a multitude of speeches, newspaper editorials, and magazine articles by men who ought to know better. They should know that utility rates, under present-day regulation, are based on the value of the property used and useful in the business, not on capitalization or security issues, and that rates are fixed to yield only a reasonable return on the actual property value."

—B. J. MULLANEY
PRESIDENT, AMERICAN GAS ASSOCIATION

What Others Think

Massachusetts Tackles the Problem of Regulating the Holding Company

WITH most of the current discussion of public utility regulation raging around the problem of the holding company—and such discussion largely turning on the question of whether or not holding companies should be regulated and, if regulated, by what particular governmental agency—it seems well to note the recent report of the Special Commission on Control and Conduct of Public Utilities in Massachusetts.

On June 7, 1929, the Massachusetts legislature enacted a law creating a special commission to investigate the public utility situation in that state for the purpose of formulating statutory recommendations. The commission was specifically directed to inquire into all phases of the holding company development.

There is little doubt but that Massachusetts is a fertile field for consideration of the status of holding companies in the utility business. Each year since 1900 there has been an ever-increasing number of consolidations of both electric and gas properties. As a result, electric business at present is carried on principally by seven large systems which sell 90.5 per cent of the total number of kilowatt hours consumed. Similarly, six systems distribute 85.2 per cent of the gas business, and five of these are among those dominating the electric field. All but one are "holding companies in the legal form of voluntary associations."

Utility leaders in the state, according to the commission, emphasize the following factors in the consolidation movement:

(a) The changes and improvements

in the generation and distribution of electricity;

(b) The advantages of large scale financing;

(c) The advantages of consolidated management;

(d) Peculiar local causes which in some cases induced consolidation. Such are the general facts with respect to holding companies in Massachusetts which lend national interest to the commission's report.

Here is what the majority of the commission found concerning consolidations:

"In many cases, extremely high prices were paid for the stock of the acquired companies, with the result that there has been pressure exerted to keep the rates high enough to permit a profitable return on the investment. As well as controlling operating companies through stock ownership, the systems have organized affiliated companies for management, construction, purchasing, financing, and the like. Large profits have been made from contracts for such services made between parties under the same control, and so without any equality of bargaining power. The payments made under these contracts are chargeable as operating expenses, and a rate high enough to leave a fair return after deducting these operating expenses is allowed."

But significant is the Commission's recommendation which states that:

"The Commission is in complete accord with the policy of the General Court and the Department, which has been to protect the public interest, but at the same time to allow the greatest possible freedom to private enterprise and initiative. We believe, however, that the present laws do not sufficiently take into account the vast changes in the industry. The legislation which we recommend is designed rather to adapt the law to meet new conditions than to make fundamental changes.

"We do not favor legislation either to break up the existing systems or to restrict

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future consolidations. In fact, we recommend no direct regulation of holding companies at the present time. The operating company is the proper unit to be regulated, and there is no danger inherent in the holding company structure if rates to the consumer are reasonable and the earnings of the operating company fair. The Department should, however, be given power to gain all the information that seems desirable from holding companies and affiliated companies, and we recommend legislation to that end.

"We also feel that supervision of the intercorporate contracts of gas and electric companies is vitally necessary. The number of such contracts between affiliated companies is so large and the forms of affiliation so devious that the only practicable way of regulating contracts where there is an inequality of bargaining power is to give the Department control over all contracts. We emphatically recommend legislation to this effect."

THIS recommendation is in line with that expressed in many quarters—that control of operating units is the essential matter but that all contracts covering management, construction, and like services should be subjected to the regulatory authority of State Commissions.

The Commission adds its voice as far as Massachusetts is concerned to the group opposing any Federal intervention in the utility field but does not definitely oppose Federal regulation in other parts of the United States. It states:

"We do not believe that the question of Federal regulation is one which demands any action on the part either of this Commission or of the commonwealth. In many of their aspects the problems involved are purely local. We believe that the states themselves should be allowed to deal with them as long as they can do so adequately. Nothing in our investigation has led us to believe that the situation in this common-

wealth as yet demands Federal regulation. We are not prepared, however, to say that such regulation may not ultimately be needed here, or that it is not now so necessary in other parts of the country as to make immediate legislation expedient."

In lieu of national control suggestion is given to the possibility of co-operative state action as a means of regulating interstate transmission of electricity. The report continues:

"It has been suggested that purely state regulation might be supplemented by a compact among neighboring states, under which co-operative action might be taken concerning interstate transmission. Such a compact can constitutionally be made with the consent of Congress. It would be advisable for steps to be taken to induce the near-by states to consider joining this commonwealth in such a compact. It might do much to make Federal regulation unnecessary. The matter might well be an appropriate subject for consideration by the New England council."

As was the case with the report of the New York State Commission on Revision of the Public Service Laws there is a vigorous minority dissent from the majority recommendations. Perhaps the most important general disagreement concerns the recommendations quoted above. In a separate statement one of the members writes:

"I disagree with the conclusion of the majority that direct regulation of holding companies is undesirable. The National Association of Railroad and Public Utilities Commissioners has for two successive years gone on record as favoring such direct regulation, and I recommend legislation to this end."

—PAUL V. BETTERS

REPORT OF THE SPECIAL COMMISSION ON CONTROL AND CONDUCT OF PUBLIC UTILITIES. Commonwealth of Massachusetts, House document No. 1200, March, 1930.

Do Utility Companies Hire Away Commission Employees?

ONE of the charges sometimes made to discredit state regulation of public utilities is that the utility companies are able to attract the services

of many competent public officials.

Such a charge was recently made in a joint resolution of the Wisconsin legislature. The resolutions recited:

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LOOKING OVER THE POSSIBILITIES FOR THE NEXT FIGHT

that the utilities have been able to outbid the state for the services of competent officials and employees and have actually invaded the Commission offices and have employed its experts at higher salaries, which higher salaries have been reflected in higher rates paid by the consumer public.

To this the Commission replied:

"We have reviewed the records in the Commission's office as to the former employees who left its employ to go with Wisconsin public utilities and we find the following list of fifteen in all, of whom three were women who took clerical positions with utilities and of whom one male employee went with a municipally owned system. There have, therefore, been eleven male employees from the engineering and statistical department of the Commission

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who went directly from its service into that of some privately owned Wisconsin utility.

"The Commission has had many hundred employees since its organization and it may be that some of these employees, after being engaged in other work, later went with Wisconsin utilities, but at the present writing we know of only two so employed. We do not know what salaries were paid these employees when they went with the utility companies but we have no reason to believe that they were paid more than would have had to be paid to others equally competent and equally qualified to do the work for which they were engaged. There seems to us to be no evidence supporting the conclusion that higher salaries which may have been paid to such individuals by utility companies are reflected

in higher rates paid by the consumer public because there is nothing to indicate that the utilities paid these men any more than they would have had to pay others whom they might have employed to do the work. In some instances the employment of these men may have represented an actual saving to the utility companies because of their special qualifications for special types of work."

This is the first attempt we have seen by a competent official authority to make a specific answer to this particular charge.

Statement to the Wisconsin Legislature by the Railroad Commission of Wisconsin relative to the preamble of Joint Resolution 53 (a).

Have the Utility Commissions Become Too Judicial in Character?

ONE of the criticisms of Public Service Commissions is that they are laying more stress upon their *quasi* judicial functions, than on their legislative and administrative functions.

Professor William E. Mosher, Director of the School of Citizenship and Public Affairs of Syracuse University, has several times claimed that in doing so the Commissions are failing to give the full measure of protection to the public. In commenting on the functions of the Commissions, Professor Mosher recently said:

"It is not my intention to comment upon the wide range of functions entrusted to a Public Service Commission, but rather to direct attention to a conflict between two major functions, both of which are of basic importance in the administration of the typical public service act. The first is the protection and defense of the public as its interests are involved in the management of the utilities; and the second is the so-called judicial function. The former represents the motive that led to the enactment of the original legislation. To realize it the Commission is granted the power of initiating investigations and proceedings. The latter is imposed on the Commission in a number of sections of the typical act. For this purpose, it is instructed to conduct hearings and render judgment. In other words, the Commission may be at one and

the same time public defender or prosecutor and judge. The most critical test to which a Commission may be subjected is the measure of its success in harmonizing these two conflicting functions. If the official reports of Commissions themselves or the observations of competent witnesses in various states are to be credited, there are but few Commissions in the country which meet this test satisfactorily. The judicial function has encroached upon, if it has not practically supplanted, that of public defender.

"On its own showing in the recent investigation of the New York Commission, the number of formal cases initiated by this agency during the course of eight years totaled only two hundred and ten. Analysis of these cases indicated that the great majority were of an inconsequential character. Furthermore, it is comparatively rare that in any proceedings do the staff members of the Commission appear on the stand as witnesses. The burden of conducting a case is placed on the consumers or their representatives, the corporation counsels of the municipalities. When it is considered how little experience in utility matters these officials have had on the one hand and how expert the representatives of the utility companies are on the other, it is apparent that, to speak familiarly, the cards are stacked against the consuming public. It is true that the Commission gives such assistance as it can to the corporation counsels in the preparation of cases, but as the evidence shows this is limited on account of the great pressure of work with which the staff is burdened.

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The result is that the cities which wish to seriously prosecute a rate case are obliged to call in outside experts. According to the record they are loath to do this because of the great expense. The conclusion cannot be disputed that the Commission has all but defaulted in performing the function of defending the public as a prosecuting agency.

"THE feasibility and propriety of doing this is being demonstrated at the present moment in the conduct of the New York Telephone Case. Here the counsel of the Commission is carrying on the prosecution as a true public defender. This policy may be explained in part by the fact that this is a state-wide case. It should be remembered, however, that in view of recent mergers and consolidations in the various utilities the number of localized operating companies is rapidly approaching the point of zero. Something more than local action has, therefore, become practically mandatory. If the Commission fails to take the initiative and to prosecute cases for the public, it will be necessary to set up another expert agency for this specific purpose. In reviewing Commission regulation over the period of nearly twenty-five years, we must list this conflict of functions as one of the major unsolved problems. It challenges attention as never before because, with the passing of local plants and localized operations, the defense of the public interests must be conducted on an 'area-wide,' if not a state-wide, basis. Consolidations also bring in their trail highly complex operating, accounting, and financial conditions. To unravel these, as is necessary in a rate proceeding, demands a high degree of expertness and a great amount of information, such as only a permanent body could command without excessive expense. As never

before, therefore, the use of initiative and a readiness to provide the requisite staff for positively representing the public will measure the efficiency of the regulatory Commission. This practically means a revolutionary change of emphasis in the conduct of the typical Commission.

"IN conclusion it may be pointed out again that the characteristic inertia of the representative Commission in the use of initiative is doubtless due in considerable part to the incongruity involved in the situation itself. The same agency can hardly be expected to prosecute and judge. It may well be that this anomaly can be finally eliminated only by separating these functions through the creation of a kind of commerce court for the trial of contested issues and an administrative and prosecuting agency upon which would be imposed the duty of protecting the public interest. But it cannot be said that the possibilities of combining the two functions have been fully explored, although it must be granted that certain exceptional Commissions have been more active in the attempt to harmonize them than others."

This is a clear statement of the views of those who believe the Commissions are becoming too judicial, and the reasons in support of that view.

It might be added that Professor Mosher does not join with those who say that the principle of public control of utilities has broken down.

"A QUARTER CENTURY OF REGULATION BY STATE COMMISSIONS;" address by Professor William E. Mosher, *Proceedings of the Academy of Political Science*, Vol. XIV, p. 43.

Facts and Fallacies About Utility Securities

UNDER the title of "The Customer Ownership Fallacy," T. J. Mead points out what he believes to be the weakness of preferred public utility stock. He says:

"The 'preferred stock' certificate of the typical electric light and power company is one of the most peculiar pieces of paper ever offered to the small-fry investing public.

"First, it pays 'dividends,' instead of the interest to which a bondholder is entitled.

Bond interest comes due periodically and must be paid. Dividends on the other hand are never due or payable until they have been 'declared' voluntarily by the board of directors of the corporation. Courts practically always refuse to compel a board of directors to declare a dividend, holding it to be a legitimate exercise of judgment on their part if they wish to keep money in the business instead of paying it out to the stockholders as dividends. The word 'preferred' simply means that that stock is entitled to any dividends which may be declared,

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ahead of the holders of common stock.

"Regardless of how much profit the company has been making, the 'preferred' stockholders ordinarily can get no more than the 'preferred' dividend rate, and that rate is about one per cent a year above the prevailing interest rate on good secured short-time loans and real estate mortgages.

"The repayment of the principal, or the price paid by the investor for his preferred stock certificate, is seldom promised except upon the liquidation of the entire company—and the bondholders 'get theirs' in full before the 'preferred' stockholders begin to have any rights in the assets.

"In short a preferred stock certificate merely says that the holder is entitled to a certain rate of dividend, *when the directors feel like giving it to him if they ever do*; and that if he ever gets his investment back it will be on the dissolution of the company and after the sale of its assets to such good advantage that the bondholders are fully satisfied."

Mr. Mead declares that the real character of preferred stocks is not changed by the fact that some bankers stand for them. He says:

"The fact that some small bankers have been whipped into line by the big power interests, and are foisting these customer ownership 'securities' on inexperienced depositors who have confidence in their judgment and integrity, certainly does not alter the real character of the average public utility 'preferred stock,' or the real purpose for which strenuous efforts are being made to distribute it as widely as possible among the voters in communities served by Power Trust corporations."

PREFERRED stocks of utility companies, like the preferred stocks of other corporations, are precisely what they purport to be. The owners of bonds get their money if the company can pay it; otherwise they can foreclose and have the property sold. The owners of stock, preferred or common, run the risk of having dividends passed. That is why it is healthier for continued service to have as large a part of financing by stock as possible. If income drops off the property does not have to be sold. The owners of preferred stock are in a safer position, however, than the owners of common stock. Their dividends must be paid before dividends on common stock. The owners of common stock in most

business enterprises have chances of greater profits than the owners of preferred stock. On the other hand, their risk is greater.

The policy of selling preferred stock of utility companies to the public,—if that is the policy,—is probably to bring the small purchasers in with a lesser risk than they would take by the purchase of common stock. It is not true, however, that the public is limited to the purchase of preferred stock. The public may buy bonds or preferred stock or common stock. All classes of securities are for sale. Neither do the purchasers have to wait until the liquidation of the company to get their money back, either in utility companies or other corporations.

There seem to be plenty of security buyers. Neither would the owners of common stock be likely to pass their own dividends, in order not to pay dividends on preferred stock.

About the worst thing utility companies could do for their own interest would be to fool the public about security issues. If there are some who are unwise enough to do that, their number is small.

If there are bankers who are crooked enough to deceive their clients about security issues, this certainly is not the general practice. The average human being is honest, whether he is in the utility business, the banking business, or any other kind of legitimate business, or whether he is a member of the public not engaged in business.

The motives often attributed to business men for particular policies are based on the presumption that business men are interested only in profits. Even if that were true, most business men are wise enough to know that such an interest is best served by honest dealing. In addition to that, the modern business man, although necessarily interested in profits, is quite as apt to be imbued with public spirit as are his customers.

—W. C. B.

THE CUSTOMER OWNERSHIP FALLACY, by T. J. Mead. *Public Ownership*, April, 1930.

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The "Defeatist" Attitude Toward the Rate Base Controversy

THE attitude of those who assert that a prudent investment rate base can not be substituted for the present value rate base, because of a long line of decisions of the Supreme Court, and that the prudent investment base would be unconstitutional, has been referred to as a "defeatist" attitude by Professor James C. Bonbright of Columbia University.

Professor Bonbright was a member of Governor Roosevelt's commission which studied the question of Public Service Commission regulation in New York state, and was one of the members who signed the minority report of that commission.

Says Professor Bonbright:

"The amazing thing about this defeatist attitude toward the Constitution is that it is accepted by so many who frankly admit that the present value doctrine of rate control has broken down and who also admit that the alternative proposed by the minority is economically sound and is generous to the investors.

"It is a strange conception of the Constitution of the United States and a doubtful tribute to the intelligence of the Supreme Court to suppose, even in advance of any litigated case, that a plan which is fair is nevertheless unconstitutional, that a scheme which gives liberal returns to investors nevertheless takes their property without due process of law, and that the due process clause, so far from being a general rule of fair dealing between different classes of property owners, has degenerated, under legal decisions, into a body of *formulae*.

"It has recently been argued by those who oppose any attempt to secure by legislation a fundamental change in the rules of rate making which have been gradually built up by the courts through the process of case decisions, that this change itself would simply substitute a new body of legal *formulae* for the one that now prevails. It has been said, for example, that the plan suggested by the minority report of the revision commission is an attempt to induce the Supreme Court to reverse itself and to accept a rigid rule that actual cost is henceforth to mark the constitutional minimum below which rates may not be fixed under the due process clause. If any such point of view has been suggested by those of us who sponsor

the minority report, the fault lies in our failure to make our own position clear and not in the position which we ourselves would really wish to take. It would be just as critical a mistake for the Supreme Court to lay down the universal rule that actual cost or prudent investment or any other standard is the one basis to which all states must adhere in their control of utility rates, as it would be for the same court to say that present value and only present value must be the universal rule. The Constitution of the United States was never intended as a substitute for legislative discretion in the exercise of those broad powers of the government which are known as the police power. The Fourteenth Amendment has always been interpreted by the Supreme Court as setting simply a limit based on decency and fairness beyond which a legislature may not go in the exercise of its wide range of discretion. Present value itself, as the phrase was interpreted by the Supreme Court, was originally a lower limit of decency, a constitutional deadline below which rates might not be fixed by act of a legislature or by order of a commission."

Professor Bonbright goes so far as to declare that the present value decisions have made regulation a farce. This is putting the criticism of public utility regulation in rather strong language. He says:

"A series of economic circumstances has caused this standard no longer to constitute a lower limit. Indeed, the testimony of the public utility companies themselves is to the effect that it is now an upper limit, and that in their own self-interest the most prosperous companies, which have been earning for their stockholders profits beyond the dreams of avarice, have not cared to impose upon the public the rates which would be required under the prevailing law of the land. This means, of course, that regulation has become a farce. It means that the companies themselves, by reference solely to the dictates of their business interests, are to be the final arbiters as to what the public must pay for the service which they have been given the monopoly power to render.

"It is for reasons such as these that our minority report concludes that abandonment of the present-value doctrine is not the end, but the necessary beginning, of any effective system of utility control."

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THE statement that regulation has become a "farce" because of failure to adopt a particular rate-making theory, is hardly a logical conclusion. Among other things, it regards rate making as the aim, or chief aim of regulation. It fails to take into consideration what the Commissions have been able to accomplish along other regulatory lines, or what they have been able to accomplish in rate reduction, or how much more could have been accom-

plished if the advocated change in theory were adopted.

Saying that regulation is a "farce" is a picturesque statement of a conclusion, but can hardly be set down as an indisputable fact.

"THE BREAKDOWN OF PRESENT VALUE, AS THE BASIS OF RATE CONTROL." Address by Professor James C. Bonbright of Columbia University, New York; *Proceedings of the Academy of Political Science*; Vol. XIV. May, 1930.

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WILL VALUATION HISTORY REPEAT? By Bancroft Hill. *The Journal of Land & Public Utilities Economics*; pp. 136-141. May, 1930.

The March of Events

Alabama

Gas For Appliances

Not only the electric utilities but also the gas utilities are these days giving attention to the encouragement of the use of more appliances in the home. A step towards this end was taken by the North Alabama Utilities Company at Sheffield, when it had C. L. Rittenhouse, associate engineer of the Commission, make an audit of the company's books to ascertain what reduced rates could be put into effect where domestic con-

sumers use several different appliances, such as ranges, heaters, gas refrigerators, and room heaters.

The *Tri Cities Daily* reports that the intention is to arrive at some rate where gas consumers can economically use appliances other than gas ranges. While Mr. Rittenhouse did not know what action the Commission would take on the matter, he expressed the hope of the utilities company to have rates reduced so that people in the district can use more gas appliances economically.



California

Service Charge Draws Fire of Bay Cities

THE Commission has been holding hearings on the new rate schedules of the Pacific Gas & Electric Company for natural gas service. One of the objects of attack by the Bay District cities is a flat service charge, which would not include the charge for a minimum amount of gas. The *Fresno Bee*, in reporting a meeting of attorneys for the cities, tells us:

"The graduated upward trend of the proposed service schedule, starting with 60 cents in San Francisco and going up slightly for Oakland. Slightly more for Sacramento, and so on in inverse ratio to population, drew the ire of the attorneys. While their session was held behind closed doors, it was learned they contended vigorously for a flat rate that would not discriminate against cities on account of size.

"President Clyde L. Seavey of the Commission intimated that the Commission may consider abolishing the gas service charges asked by the company and reframing rates on a minimum charge basis, if the Commission finds that the public is unalterably opposed to the service charges.

"But he added that he believed the public protests against the charges 'may be the result of misunderstanding,' and that he person-

ally 'has always been in favor of the service charge because it brings a lower total charge for the family class of consumers.'"



Merger Faces New Attack

THE Great Western Power and Pacific Gas & Electric companies' merger has again been assailed by city attorneys of Oakland and Sacramento by way of a petition for a rehearing by the Commission, which approved the merger last month.

We read in the *Sacramento Bee* that Preston Higgins, city attorney of Oakland, intends to take action in the supreme court if satisfaction is not granted by the Commission. Sacramento would join in this procedure.

The latter city stands to lose about \$4,000 annually by the merger in franchise taxes collected from the Great Western Power Company. Oakland will lose about \$30,000 annually, according to the *Bee*.

The decision to continue opposition to the merger was not unanimous in the Sacramento city council. Councilmen C. W. Anderson and Harry S. Maddox cast dissenting votes. Mr. Maddox defended the right of the company to merge and indicated he feared the city would be subjected to unnecessary expense by taking any part in the proceeding.



District of Columbia

Experts Wanted for Commission Appraisals.

IN estimates for the cost of its work for the 1932 municipal budget the Commission has asked appropriations for expert assistance in the valuation of public utilities. The Commission wants more dependable data available without the necessity of constant revaluation of utilities.

The people's counsel finds that the steady growth of work in his office requires the temporary employment of an expert to aid in the presentation and defense of legal cases and other matters. He has asked for an additional \$5,000 to pay the salary of an independent expert.

Car Fares and Mergers

THE bill to merge the street railways in the District of Columbia met defeat on May 21st before the House District Committee when consideration was postponed indefinitely by a vote of 11 to 3.

Apparently inseparable from the merger question is the fare question. Another merger was proposed some time ago and was unsuccessful in Congress. The street railways then asked for higher fares, which were denied by the Commission with the intimation that co-ordination in the operation of the two companies would result in economies making the higher fare unnecessary. Such co-ordination, according to the companies, could not be successfully substituted for a merger.

The fare decision was appealed to the District supreme court, where Justice Jennings Bailey on May 22nd started to hold hearings. The contention was made that under the 10-cent fare the Capital Traction Company would earn no more than 4.83 per cent on its present valuation and the Washington Railway & Electric Company not more than 6.25 per cent. No valuation has been made of ei-

ther property by the Commission since 1919.

In response to agitation for a 2-cent car fare for school children, the house on May 27th passed a bill providing such a fare. The senate District committee on June 4th amended the house bill to provide for a 3-cent fare. The reduction in revenues from the lower fares for school children has been estimated all the way from \$15,000 to \$30,000 a year.

Gas Merger May Bring Lower Rates

A PROJECT for a merger of the Washington Gas Light Company and its subsidiary, the Georgetown Gas Light Company, has been approved by the Public Utilities Commission and by the Senate District Committee, but several times when it has come up before the senate consideration has been deferred. Resulting economies from operation have been urged as a reason for merger, but no new rate schedules have yet been filed.

George A. G. Wood, president of the Washington Gas Light Company, is quoted in the District of Columbia *News* as saying that his company would not file a schedule of proposed new and reduced rates with the Commission as an inducement to get Congress to pass the gas merger bill, but that he has been thinking about reducing the price of gas to Washington consumers, and 10 per cent, which has been mentioned as the probable extent of the reduction, is but a minimum. The cut, he thought, would be greater than that.

He added, however, that he could not accurately determine what the rate should be until the company is able to float new securities upon which to raise money to spend in bringing the gas manufacturing plant and distribution system up to date. These securities, he pointed out, cannot be issued until legislation is passed because, as the law now stands, the gas company cannot issue new stock without congressional consent.



Indiana

Electric Rates in Bloomington under Attack

A MOVEMENT has been started by the Bloomington city council to seek a reduction in electric light rates. The city attorney on May 21st was directed to file a petition with the Public Service Commission, but when attorneys for the company made a

plea for a chance to negotiate a settlement, a committee was appointed to confer with the utility officials before petitioning the Commission.

The point has been raised that rates in Bloomington are far in excess of those in other cities similarly situated. Home lighting, power, and city lighting are said to be the chief bones of contention in this controversy.

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Kansas

Financing Found to Be Difficult without Franchise

THE Hutchinson Gas Company has been operating without a franchise for several years, and it is now trying to get a franchise from the Hutchinson city commission. The commission, according to the *Hutchinson Herald*, is not exactly friendly toward the matter because they remember that some time ago when they granted a franchise to another company, the people voted it down and killed it.

But the gas company contends that this is a different matter. When the former franchise was granted, to the Larutan Gas Company, they were in no position to furnish gas, and

it is argued that the city should not grant a franchise intended merely for bargaining, or to help in promoting a new company, when gas is already being satisfactorily served by another concern. It is admitted in official circles that the gas service now being rendered in Hutchinson is good, that the gas rates are satisfactory, and that the company is "behaving very nicely."

The Hutchinson Gas Company, however, contends that they are handicapped in financing extensions because of having no franchise. They cannot borrow money as long as they have no assurance that they will be allowed to do business. It has been suggested that the commission will put the matter up to the people for a vote in connection with the August primary.



Louisiana

Higher Salaries for Commissioners Approved

UNANIMOUS approval of a bill raising salaries of members of the Louisiana Public Service Commission from \$3,000 to \$6,000 a year, according to the *New Orleans Times-*

Picayune, has been voted by the House judiciary committee.

Members of the committee were informed that the salaries of the members are the same as thirty years ago, and that the duties of the Commission have increased steadily. Higher salaries prevail in many states where there are Public Service Commissions.



Massachusetts

Order For Telephone Investigation Killed by Senate

THE senate during the last week of May, by a rising vote of 5 to 13, refused to adopt an order for the appointment of a special legislative committee to investigate telephone rates in Andover. The order had been

adopted in the house of representatives before the senate action.

Opponents of the order asked where the legislature would be if it were to order investigations of rates in any or every city and town. Senator Erland F. Fish, Republican floor leader, was of the opinion that it involved a matter which should be handled by the State Department of Public Utilities.



Michigan

Confiscation in Telephone Rate Order Denied

EXCEPTIONS to the report filed by William S. Sayres, Jr., special master in chancery in the telephone rate case in Federal court, in which the rates fixed by the Commission in 1925 for the Michigan Bell Telephone

Company were held to be confiscatory, have been filed by Wilber M. Brucker, attorney general, in behalf of the Commission, through Harold Goodman, special counsel for the state. Exceptions have also been filed in behalf of several cities. A special statutory court consisting of three judges will probably hear final arguments early in July.

The Commission contends that the true fair

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value of the telephone properties is \$142,896,271 instead of \$150,509,025 as found by the special master. A finding of \$10,898,590 for going value is termed excessive.

An attack is also made upon the straight-line method of computing depreciation. Exception is taken to the action of the special master in following the depreciation method approved by the Interstate Commerce Commission, on the ground that the court is required to reach an independent conclusion in respect to the alleged violation of constitutional rights, and that it may not allow to the company any more than the actual loss which may be attributed to the property on the score of depreciation. This, it is urged, is not determined in any way by any bookkeeping or accounting practice, but as a matter of fact, which bookkeeping and accountancy in no manner modify. It is added that, in fact,

the Interstate Commerce Commission has not prescribed the depreciation charges for telephone companies.

The Commission also excepts to the finding that a return of 7 per cent on the fair value of the company's property is necessary to avoid confiscation. A return of 6 per cent is declared to be non-confiscatory.

It is further urged that the suit should be dismissed on the ground that by additions and retirements since the case first started, new conditions have arisen to the extent that approximately one half of the company's property not then in existence has been added, and the business itself bears little, if any, relation at the present time to its situation in 1926. The point is made that the company should be required to resort to the Commission and there show the present situation in respect to its business.

Missouri

Rate Control by Franchise

"KANSAS City's sad experience with franchise" is the heading of an article in the *St. Louis Post-Dispatch* in which the fact is bemoaned that recent decisions of the Missouri supreme court upset the right of cities to regulate rates by franchises. Kansas City, according to this report, has learned from the supreme court that an 8-cent franchise fare means nothing.

City Counselor John T. Barker of that city is quoted as saying that "in view of the existing court decisions it is silly, useless, and ridiculous for a city to enter into any fran-

chise contract with a public utility company."

Of course, what this all means is that the granting of franchises in Missouri, as in many other states, is a matter for city discretion, but the question of rates is a matter of interest to the state, and the state through its Commission will regulate fares.

The suggestion has been put forward that no more street railway franchises be granted, but that the cities grant simple permits to operate, which would be based on the company's agreement to accept city regulation of fares and service. The company could be evicted at any time that it refused to accept city regulation.

New Jersey

Fare Raise Hearing Started

HEARINGS by the Commission were started on May 22nd in the Public Service Co-Ordinated Transport fare case. The company is seeking an increase in token fares from ten for 50 cents to eight for 50 cents. An alternative has been suggested that a charge of

10 cents be made during five rush hours, and 5 cents other hours. Another possibility is the sale of 4 tokens for 25 cents.

The company has been operating since January 1st under a plan of selling tokens at ten for 50 cents with a 10-cent straight cash fare. This, it appears, has not produced the revenue desired.

New York

Railroad Objects to Expense in City

THE Long Island Railroad Company on May 27th filed petitions with the Transit

Commission and the Public Service Commission for a rehearing in connection with recent orders directing the company to spend approximately \$20,000,000, most of which would be used for transit facilities in the city of New York.

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The company urges that the city is preparing to provide these facilities by a rapid transit extension. It seeks to show the Commission the past effects, the present effects, and the probable future effects of (a) rapid transit lines completed and in operation, (b) lines under construction and nearing completion, (c) lines planned, although not yet under construction.

The company states that it is prepared to show, among other things, that about 45 per cent of its passenger revenue comes from business originating and terminating within the limits of the city of New York, and that the new facilities in the city will inevitably take the greater part of the business from the railroad. The orders of the Commission are deemed "improvident and wasteful and would impose a direct burden on interstate commerce." They are declared to be "unreasonable and confiscatory." Other grounds for objection to the orders are also urged.

Brooklyn Gas Rates

THE Commission has been holding hearings on the rates of the Brooklyn Union Gas Company and the Brooklyn Borough Gas Company. In both cases there is involved the question of proper allocation of costs between consumers.

The Brooklyn Borough Case is on rehearing, in which protest is made against the initial charge of \$1 for the first 200 cubic feet of gas. This is termed a block rate by the company, but objectors contend that it in-

cludes a service charge which is prohibited by law.

A proposed rate of the Brooklyn Union Company has been characterized by consumers' representatives as a "novelty" at variance with price schedules in business outside of the utility field. Here it is sought to include a 95-cent initial charge. This is also on a rehearing.

Buffalo Fare Case to Go Before Special Master

A STATUTORY court of three judges has denied a temporary injunction to prevent official interference with a proposed increase in fares to 10 cents for the International Railway Company in Buffalo. The court decided that a special master should be appointed to take testimony on the conflicting claims of valuation, operating expense, and earnings.

Taxicab Regulation

THE advisability of recommending that the taxicab industry be placed under some form of public utility control involving a limitation of the number of cabs, regulation of rates, and narrowing the present jurisdiction of the New York police department is being considered by a commission on taxicabs appointed by Mayor Walker. The special commission has been holding hearings on the question of taxicab regulation.

North Carolina

Wilmington Objects to Electric Rate

THE Commission, in the latter part of May, was considering the rates of the Tide Water Power Company at Wilmington, which it is charged by the city and several individuals, are excessive. The rates affect not only Wilmington but many other communities in the Seaboard section of the state.

Figures were introduced to show that power charges in Wilmington were in excess of charges in Raleigh, Roanoke Rapids, Char-

lotte, and other cities of the state. It was testified by one witness that electric rates for the entire country had shown a steadily downward trend since 1890, but that the Tidewater rates had remained practically the same. Counsel for the company contended that this testimony was not pertinent to the question of fixing rates on the value of the Wilmington enterprise.

Wide differences appeared in appraisals of real estate and other property items. The rate base claimed by the company is \$3,660,834 while an opposing witness testified that the value was \$1,975,000.

Oklahoma

City Option to Purchase if Rates Increase

A SO-CALLED model gas franchise, according to the Oklahoma *Oklahoman*, has been completed by Malcolm W. McKenzie, Oklahoma City municipal counselor, and sent to a citizens' advisory committee. Copies have been forwarded to three companies expected to bid on a franchise fixing a domestic gas rate approximately 15 cents less than the current charge of the Oklahoma Natural Gas Company, 57 cents a thousand cubic feet.

The franchise stipulates that the city shall

have the right to exercise an option to buy the distributing plant if a rate increase application is filed, and that no company operating under the agreement can sell out to or merge with any company now holding a similar franchise. Should the company obtaining the new franchise wish to sell, it could not do so without the vote of the people.

The city is given the right to purchase the distributing plant at the end of twenty years and at the end of each year thereafter for the next five years.

The company obtaining the franchise will be required to pay the city 1 per cent of its gross revenue each month.



Pennsylvania

Air Route Opposed

THE Pittsburgh Airways, Incorporated, during the latter part of May, applied to the Commission for authority to operate air lines from Pittsburgh to Philadelphia and Newark. This was opposed by the Pittsburgh Aviation Industries Corporation at a hearing on May 28th.

It was testified, according to the *Pittsburgh Press*, that the Airways concern had insuf-

ficient funds with which to operate its present line to New York and to start the new Philadelphia route. The aviation company argued that the two monoplanes and two biplanes now in use would not be enough for both lines. The Airways corporation said a tri-motor plane is to be put into operation.

The York Airport Company, says the *York Dispatch*, joined with the Pittsburgh Airways, Incorporated, in asking the Commission to grant authority.



Wisconsin

Madison Car Fares

THE Madison Railways Company has filed a petition with the Commission asking for an increase in street car and bus fares. The city council opposes the application.

The new rate, if approved, would be a flat 10-cent cash fare for adults, eliminating the sale of tokens. The fare for children would remain at 5 cents. Transfers would not be made from busses to street cars except in those instances where the busses have replaced street cars. Tokens would be sold only to school children at the rate of ten for 50 cents. These would be accepted only during limited periods when the children are going to and from school.

The company declares that it has been losing money because of the competition of private automobiles, but it is claimed that the present traffic of approximately 5,000,000 passengers a year, or about 14,000 daily, indi-

cates that a real need exists for a street railway system, and that the company is justified in charging a rate of fare which will be commensurate with the cost of service.

City and Company Dissatisfied with Fare Order

BOTH the city of Milwaukee and the Electric Company have appealed from the order of the Commission raising street car fares. It is urged by the city that the order was unjust because it made Milwaukee street car riders pay for service to the suburbs. The company denies that primary consideration should be given to the city's boundary in fixing rates of fare. It contends that the new street car fares should be applied to a former single fare area.



PUBLIC UTILITIES FORTNIGHTLY

The Latest Utility Rulings

ARKANSAS COMMISSION: *Re Ice Distributors.* All ice dealers in Arkansas have been ordered by the Commission to adopt uniform designations for display on vehicles used for the delivery of ice, showing the name, address, telephone number, and permit number of the operator. Docks, platforms, and terminals where ice is sold must likewise be designated by uniform signs.

CALIFORNIA COMMISSION: *Re Rasmussen Co., Inc.* The operative rights of R. W. Rasmussen & Co. were revoked and annulled upon evidence of unauthorized operations. The Commission held that auto-truck operations under writings not providing for any specific tariff or volume of tonnage, under stabilized rates, and not imposing an obligation on the shipper to patronize the service are not those of a private carrier within the doctrine of decisions laid down by the higher courts.

CALIFORNIA COMMISSION: *Re Anderson Canal, Inc.* Numerous canal utilities were authorized to file a rule providing for the assessment of a charge to take care of a water engineer to be appointed by the Railroad Commission pursuant to an agreement between the various companies.

CALIFORNIA COMMISSION: *Penfield v. Occidental Life Insurance Co.* Upon the complaint of various purchasers of house lots against the discontinuance of water service by a life insurance company, present owner of properties formerly used by a real estate operator to furnish water to the surrounding subdivision, such operator having represented to all the purchasers that he would continue to supply water for a compensation to these lots, the Commission held that the property was not so impressed with a public trust under his ownership as to compel the insurance company, upon obtaining possession of it, to continue the utility service.

DISTRICT OF COLUMBIA COMMISSION: *Re Setting Up of Reserves, Contributions, and Donations by a Public Utility Company.* The District Commission in handing down general orders regarding the setting up and handling of reserves (other than depreciation), contributions and donations, interest during construction, and property not used in rendering service to the public, ruled that contributions and donations for conventions and industrial meetings, membership dues and fees, should be chargeable to operating expenses subject to the approval of the Commission. The Commission also ruled that donations to churches, community chests, charitable institutions, and like organizations, must not be considered in rate making.

ILLINOIS COMMISSION: *Re Illinois Bell Telephone Co.* The Commission refused to approve of a proposed increase of rates for telephone service in Decatur that were calculated to yield a net return of approximately 8.57 per cent on the fair value of the company's property, and so modified the proposed increase as to yield approximately a 6.83 per cent return.

ILLINOIS COMMISSION: *Re Illinois Northern Telephone Co.* A proposed increase of telephone rates for service at Macomb, Ill., calculated to yield a return of approximately 8.32 per cent of the fair value of the property involved, was held to be excessive and the rate schedule was so modified as to yield approximately a 7 per cent return on the fair value of such property.

INDIANA SUPREME COURT: *Re Northwestern Indiana Telephone Co.* The supreme court reversed the decision of the Lake Circuit Court, which in turn had reversed an order of the Indiana Commission denying a petition of the Northwestern Indiana Telephone Co. and the Winona Telephone Co. and another to purchase capital stock and assets of the first-named company. The higher court held that all that portion of the judgment of the lower court wherein the latter substituted its discretion for that of the Commission was erroneous.

INDIANA COMMISSION: *Re Linton Gas Co.* The Commission authorized the use of butane gas (liquefied natural gas) for the first time in this country, according to the Commission, to serve a whole city through a general distribution system. The development comes as a result of the acquisition by an Indiana bank of an unprofitable gas plant. The experiment, inaugurated more than a year ago, was said to be highly successful. The Commission claimed that the results were watched with interest by engineers and utility operators throughout the country, as well as by representatives of the Federal Government.

KANSAS COMMISSION: *Re Kansas Power Co.* The Kansas Power Co. has been authorized to purchase and the city of Everest has been permitted to sell a city plant.

MISSOURI COMMISSION: *City of Cape Girardeau v. Missouri Utilities Co.* The utility corporation furnishing water, gas, and electric service to a municipality was directed to make provision, within sixty days, for the construction of an adequate intake of a gravity type filter for the purpose of filtering water to be furnished the inhabitants of such city, and for the construction of the necessary mains and other equipment for connecting such intake with the utility's systems.

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The company was also required, within sixty days, to furnish gas of a standard British Thermal Unit heat content, as required by the Commission in its general order No. 20. Certain improvements for street lighting were also ordered.

MISSOURI COMMISSION: *Re Alleghany Corp.* The proposal of the Alleghany Corp., a Maryland company, to acquire the stock of the Missouri Pacific Railroad Co., was held not to be detrimental to the interest of the railroad or to the general public. The Commission said that in the absence of a showing that such a transaction would be detrimental to the public, it was the duty of the Commission to grant the application.

MISSOURI SUPREME COURT: *Re Kansas City v. Kansas City Terminal Railway Co.* The court held that the vested right of Kansas City to the performance of an ordinance provision requiring a terminal railway company to construct necessary viaducts was not destroyed by the subsequent enactment of the Public Service Commission law regarding the regulation of railroad crossings.

MISSOURI SUPREME COURT: *Kansas City Public Service Co. v. Latshaw.* The highest Missouri court made final a temporary writ of prohibition issued by it last July against Circuit Judge Latshaw at Kansas City, enjoining him from interfering with the enforcement of an order of the Missouri Commission, granting an increase in street car fares to the Kansas City Public Service Co. The court held that rate regulation is absolutely divorced from other matters concerning which a city and a public utility might lawfully contract, and that the utility is not prevented from seeking an increase in rates which is solely within the jurisdiction of the Commission, although it may have violated the terms of its contract with the city relating to other matters.

NEW YORK APPELLATE DIVISION, SUPREME COURT: *Re Niagara, Lockport & Ontario Power Co.* The determination of the New York Public Service Commission to the effect that it was not empowered to decide whether the municipally owned electric plant of the city of Jamestown was furnishing electric service at a price less than that fixed by the city charter, was reversed, and the cause remanded to the Commission for further proceedings.

NEW YORK COMMISSION: *Re Iroquois Gas Corp.* The petition of a gas company under §§ 71 and 72, of the New York Public Service Commission Law, for the determination of prices to be charged the public for natural and mixed gas, and asking authority to put into effect an immediate reasonable temporary increase was granted. The Commission made some modifications in the amounts claimed

for various items by the company in valuing its property.

OREGON COMMISSION: *Re General Orders for Electrical Utilities.* On and after June 15, 1930, new rules were effective for making extensions of electric lines to serve farms. The Commission stated that the larger utilities should construct short sections of lines for experimental purposes, using different kinds of wood for poles and different methods of preservative treatment as a test in order to ascertain the most economical kind of wood for poles and the proper preservative treatment most suitable for the different soil and climatic conditions in the state. The Commission ruled that service should not be rendered to a new rural consumer within five years until he has presented proof to the utility that he has paid to the present customers his pro rata share of the construction cost. [Reviewed in this issue.]

TENNESSEE CHANCERY COURT: *Southern Cities Power Co. v. Hannah.* The action of the Tennessee Commission in ousting the Southern Cities Power Co. from the city of Franklin, and in authorizing the exercise of another franchise granted by the officials of that city to the Franklin Power & Light Co. was annulled by the decision of Judge A. B. Neil. The Commission order had been based upon the opinion that the Southern Cities Co. had been ousted from operations in the town by the action of the local municipal authorities in refusing to renew the company's franchise, and in awarding a new franchise to the Franklin Power & Light Co., Judge Neil held that whatever authority the municipal officers might have had was superseded by a statute giving general jurisdiction of all utilities to the State Commission. The court also ruled that utilities were exempt from the operation of anti-trust laws.

UNITED STATES SUPREME COURT: *Grubb v. Public Utilities Commission.* An unappealed judgment of the supreme court of Ohio sustaining an order of the Ohio Commission, alleged to have been an attempted interference with interstate commerce, was held by the United States Supreme Court as a final determination of the validity of the Commission's order in disposing of a suit commenced in the Federal court to restrain the enforcement of such order. The Federal suit was started prior to the proceedings in state courts but was not concluded before the decision of that court. [Reviewed in this issue.]

UTAH SUPREME COURT: *Public Utilities Commission v. Pulos.* The supreme court dismissed a suit by the Commission to enjoin the operations of a motor carrier without a certificate of convenience and necessity, where the Commission had failed to allege that the carrier was operating along an "established route."

The Utilities and the Public

The Senate and the Dial Phones

THE whole country has been interested, and to some extent amused, by the recent outburst in the United States Senate against the dial phones. The Conscript Fathers passed a resolution instructing the sergeant-at-arms to have the dial phones removed from the Senate wing and Senate office building within thirty days. Senator Carter Glass of Virginia led the attack complaining against being made "an employee of the telephone company without compensation."

From the Senate the revolt spread to the House, where Representative Abernethy of North Carolina introduced a similar resolution.

Of course, a good many funny things have been written about the incident. Will Rogers said that the real fault the Senators found with the dial phones was the fact that if you got the wrong number, you had no one else to blame but yourself, and that the Senators couldn't tolerate any arrangement where the responsibility could not be shifted.

But aside from its humorous aspect, the Senate dial phone controversy involves two important factors of regulation—the adequacy of service and public relations. These features become important in view of the threat of Senator Dill of Washington, in speaking on the Glass resolution, to introduce a bill in Congress to make the telephone company take every dial

phone out of the District of Columbia.

First of all—is the dial phone an adequate type of service? They are in use in most of our large cities and are being placed into more every day. They have received the stamp of approval from practically every Commission having jurisdiction over telephone service.

The Department of Public Works from Senator Dill's own state ruled, in 1923, that the installation of machine switching to replace manual equipment was justified by reason of the "reduction in operating costs, speed, and ease of obtaining connections and disconnections, accuracy of connection, voice transmission, and secrecy, besides elimination of faults inherent in manual operation such as fluctuations in service, impairment of service by epidemics, strikes, etc., and the mistranslation of the subscribers' desires."

As it stands, the installation of the dial system in Washington by a telephone company, acting in good faith and on the satisfactory experience of numerous other communities, has cost \$4,500,000. Tearing this equipment out will cost almost as much. Of course, it would be placed on the bill of the helpless Washingtonian, who is without even the power to vote his protest—placed there by gentlemen who reside in Washington approximately four months out of the year.

Incidentally, if the voice of the

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press is any evidence of the will of the people, the residents of the Capitol City are quite satisfied with the new system. One Washingtonian publicly

offered to send his six-year-old daughter up to the Capitol to teach the learned Congressmen how to operate the dial phones.



Reduced Car Fares for School Children

WHILE we are on the question of utility legislation for Washington, we might take a look at the McLeod bill for reduced fare for school children. This bill, which has passed the House and appears, at this writing, likely to pass the Senate, at least in a modified form, would permit Washington school children to ride for 2 cents, or 3 cents.

The moving spirit behind this legislation, with all due regard to the author, Representative McLeod of Michigan, seems to be a Washington philanthropist, John J. Noonan. Mr. Noonan cites many touching instances of why school children should ride more cheaply.

Few would find fault with the laudable motives behind this proposal, but many will question the economic soundness of the means to attain the end. Granted that parents should be aided in sending their children to school, why should the other car riders bear the whole additional burden? The car companies, we may assume,

will be allowed a rate sufficient to yield a fair return regardless of the increased operating costs and this will simply mean putting the bill on the car-riding adults.

Now there are a great many Washingtonians who do not ride street cars who will have no share in contributing to this charitable venture. As a matter of fact, those who do not ride the cars are better able to contribute than those who do. Car riders, if not poor, are likely to be moderately blessed with the goods of this world. The idle rich, as a class, are not riding on street cars these days. Isn't it something like robbing Peter to pay Paul?

Decisions of the Commissions and economists would seem to indicate that such social ideals are financed with far more economical soundness and equity by defraying their cost directly out of general tax funds rather than placing the whole burden on the shoulders of a single class and a poor class at that.



Five Supreme Court Decisions Uphold State Regulation

DURING the past month, the United States Supreme Court has handed down a number of important decisions affecting utility regulation. There was the Great Northern Rail-

way Case in which the highest court held that intrastate rates fixed by the North Dakota Commission are immune from Federal injunction pending a review of their effect on inter-

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state rates by the Interstate Commerce Commission.

Again there was the appeal by the Oklahoma Commission from a decree of a Federal court restraining the enforcement of the Commission's order granting a certificate to a co-operative cotton ginner's association to do business.

State's rights in the matter of utility regulation gained yet more ground when the highest court held that an unappealed judgment of the supreme court of Ohio, sustaining an order of the Commission of that state which was contested on the ground that it interfered with interstate commerce, was a final determination of the validity of the order, notwithstanding the commencement of a suit to enjoin the order in Federal court started prior to the state court proceedings, but concluded after the decision of the latter.

In a Georgia case, the street railway company in Decatur, unable to pay expenses from operations under

a 5-cent franchise which the Georgia Commission had no authority to change, started to tear up its track. The state supreme court issued an injunction restraining them from discontinuing the service, holding that the fact that the company had made a bad bargain was no excuse for breaking it. The highest court sustained the state court.

Similarly, in South Carolina, a utility which had a consolidated franchise to render electric railway, light, and power service in Columbia was directed to resume traction service which it had abandoned because it could not make money at the rate specified in the franchise for street car service. Again the United States Supreme Court sustained the state court.

It is interesting to note that in all five of these decisions the position of the state courts and State Commissions was sustained as opposed to parties seeking to invoke Federal interference with state regulation.



The Re-Sale of Current by Landlord to Tenants

SUBMETERING of electricity still flares up here and there and will probably continue to do so until some outstanding decision passing on all the aspects of this complicated regulatory problem starts a definite trend.

The latest news comes from Missouri, where the owner of an apartment house, in Fulton, sought to have the Fulton municipal electric plant

sell current to him at large block wholesale rates for resale to his tenants through submeters.

The Commission registered its disapproval of the practice of submetering and refused to approve of the contract. The opinion pointed out the inability of the Commission to control the rates or service of the non-utility landlord.



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Contrary Rulings on the Extension of Rural Electric Service

ALMOST at the same time the Ohio Commission was handing down its decision requiring an electric company to furnish service over rural lines to customers regardless of whether or not they had paid their share of the construction cost to the customer who financed the extension, the Oregon Commission ruled that service should not be rendered by an electric company to a new rural consumer until he has presented proof to the utility that he has paid to the original customers, who financed the extension, his proportionate share.

The Ohio proceeding arose when Messrs. Smith and Holcomb, of Trumbull County, asked the Commission of that state to compel the Pennsylvania-Ohio Power & Light Company to turn on power to them over lines to which they claimed to have

properly connected their properties. The electric company justified its refusal on the grounds that it had made a contract with a township school district—its original customer in that territory. The school district had financed construction of the power line to which the complainants were connected.

In this contract, the electric company agreed not to turn on service to any other customers over the new line until said customers should have paid to the school district their proportionate share of the construction costs. The Ohio Commission refused to consider this contract as justifying the utility's refusal to serve.

The Oregon ruling came in the form of a general order for all electric utilities serving rural communities and was effective June 15, 1930.



Changed Policy Regarding Wholesale Gas Supply Contracts in Colorado

THE Colorado Commission has reversed itself on the question of whether or not it should require a distributing gas utility to keep its eye open for any available source where it might obtain gas at a cheaper wholesale rate.

Last December in passing upon the application of the Arkansas Valley Natural Gas Company to do business in Las Animas, the Commission granted the certificate upon condition

that, notwithstanding its existing contract for a wholesale supply, the company would be required to obtain a substitute source of supply, if it could be obtained at materially lower rates.

In its more recent action on the application of the Public Service Company to do business, the Commission is of the opinion that it is not called upon to impose such conditions as were directed in the Arkansas Valley Case.



Public Utilities Reports

COMPRISING THE DECISIONS, ORDERS, AND
RECOMMENDATIONS OF COURTS AND COMMISSIONS



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Q These official reports are published annually, in their entirety, in five bound volumes, with the *Annual Digest*, at the price of \$32.50 for the set. These volumes, together with a year's subscription to PUBLIC UTILITIES FORTNIGHTLY, will be furnished for \$42.50.

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v.

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[No. 364.]

(— U. S. —, — L. ed. —, — Sup. Ct. Rep. —.)

Discrimination — Federal Commission authority — Intrastate carrier rates.

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Injunction — Power of the courts — Intrastate carrier rates.

2. A Federal court, pending a determination by the Interstate Commerce Commission as to whether intrastate carrier rates fixed by a State Commission are discriminatory, has no authority to restrain the enforcement of such an order, p. 233.

[May 19, 1930.]

A PPEAL by a State Commission from a decree of a lower Federal court restraining the enforcement of an order of the State Commission fixing intrastate carrier rates; lower court reversed and cause remanded with direction to dismiss the bill of complaint. For case below see 33 F. (2d) 934.

Mr. Chief Justice HUGHES delivered the opinion of the Court:

On May 8, 1929, the Board of Railroad Commissioners of the state of North Dakota made an order prescribing intrastate class rates. The existing rates were reduced about ten per cent and the order was made effective on July 1, 1929. The appellees, common carriers engaged in interstate transportation and also in intrastate transportation in North Dakota, brought this suit on June 25, 1929, in the district court to enjoin enforcement of the order pending the deter-

mination by the Interstate Commerce Commission of the question whether the intrastate rates, as thus prescribed, causes an undue or unreasonable discrimination against interstate commerce in violation of § 13 of the Interstate Commerce Act. The district court, composed of three judges, as required by statute, granted an interlocutory injunction to this effect (33 F. (2d) 934) and the Railroad Commission of the state and the other state officials, who were defendants, have brought this appeal.

On August 26, 1920, the Interstate

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Commerce Commission, in a proceeding known as *Ex parte 74*, authorized a general advance in interstate freight rates throughout the United States. *Re Increased Rates, 1920, 58 Inters. Com. Rep. 220.* The appellees then applied to the Board of Railroad Commissioners of North Dakota for authority to make increases in the North Dakota intrastate class rates to correspond with the increases which had been made in the interstate class rates. The State Commission denied the application. Thereupon, in a proceeding (Docket No. 12,085) under § 13 of the Interstate Commerce Act the Interstate Commerce Commission made a finding that the interstate rates established by the carriers, as a result of the decision in *Ex parte 74, supra*, were reasonable for interstate transportation and that the failure correspondingly to increase the intrastate rates within the state of North Dakota resulted in an undue preference to the shippers of intrastate traffic within that state and in an unjust discrimination against interstate commerce. On May 3, 1921, the Interstate Commerce Commission entered an order requiring these carriers to increase the intrastate freight rates in North Dakota so as to correspond with the advances in interstate rates. *Re North Dakota Rates, Fares, and Charges (1921) 61 Inters. Com. Rep. 504.* These increases were made, effective May 27, 1921.

On June 5, 1922, the Board of Railroad Commissioners of North Dakota made an order reciting that the order

of the Interstate Commerce Commission of May 3, 1921, *supra*, practically deprived the State Commission of its power to regulate intrastate rates and that appropriate action should be taken to terminate the disability. Upon application by the State Commission, the Interstate Commerce Commission (July 22, 1922) vacated its order of May 3, 1921, *supra*, in so far as it related to intrastate rates in North Dakota, stating that "the existing increased intrastate rates and charges for freight services in said state will continue in force and effect until revoked, modified, or superseded by appropriate lawful proceedings before said Board" (the State Commission) "or as otherwise provided by law." The State Commission was thus left free to exercise its lawful authority over intrastate rates.

The Congress, by Joint Resolution of January 30, 1925 (43 Stat. 801), directed the Interstate Commerce Commission to make an investigation of the rate structure of common carriers in order to determine to what extent and in what manner existing rates and charges might be unreasonable or unjustly discriminatory, and to make such changes, adjustments, and redistribution of rates and charges as might be found to be necessary. The Commission was required to make from time to time such decisions as it might deem appropriate to establish a just and reasonable relation between rates upon designated classes of traffic.¹ Pursuant to this direction, the Interstate Commerce

¹ The provision relating to the investigation is as follows:

"That the Interstate Commerce Commission is authorized and directed to make a thorough investigation of the rate structure P.U.R.1930C.

of common carriers subject to the Interstate Commerce Act, in order to determine to what extent and in what manner existing rates and charges may be unjust, unreasonable, unjustly discriminatory, or unduly pref-

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Commission on March 12, 1925, instituted the proceeding known as Docket No. 17000, "Rate Structure Investigation" (155 Inters. Com. Rep. 247, 517) and all common carriers subject to the Interstate Commerce Act were made respondents. Notice was sent to the governor of each state and to the state regulatory Commissions. The Interstate Commerce Commission thus undertook the investigation of the rate structure in the entire western district, including class rates in the region embracing the state of North Dakota. The Board of Railroad Commissioners of that state, with other State Railroad Commissions, have been co-operating in this investigation and the proceeding is still pending.

On May 29, 1925, the Board of Railroad Commissioners of North Dakota on its own motion began an investigation for the purpose of determining to what extent, if any, the North Dakota intrastate rates were unreasonable or unjustly discriminatory. In September, 1927, the State Commission directed that the record should be held open for further hearing after the Interstate Commerce Commission rendered a decision in its Docket No. 17000. A few months later, the State Commission resumed

essential, thereby imposing undue burdens, or giving undue advantage as between the various localities and parts of the country, the various classes of traffic, and the various classes and kinds of commodities, and to make, in accordance with law, such changes, adjustments, and redistribution of rates and charges as may be found necessary to correct any defects so found to exist. In making any such change, adjustment, or redistribution the Commission shall give due regard, among other factors, to the general and comparative levels in market value of the various classes and kinds of commodities as indicated over a reasonable period of years to a natural and proper development of the

its general investigation and a hearing was held in relation to class rates and certain other rates. This resulted in the order of May 8, 1929, now in question, reducing the existing intrastate class rates.

The appellees then filed a petition with the Interstate Commerce Commission alleging that the scale of class rates required by the State Commission would unjustly discriminate against persons and localities in interstate commerce, and would constitute an unreasonable burden on interstate commerce, in violation of § 13 of the Interstate Commerce Act, and asked the Interstate Commerce Commission to institute a proceeding to determine whether such unjust discrimination would result and to prohibit it by prescribing the class rates to be charged by the carriers for intrastate transportation in North Dakota. Thereupon, this suit was brought. The interlocutory injunction, granted below, restrained the State Commission and other state officials from putting into effect the intrastate class rates prescribed by the order of May 8, 1929, until the Interstate Commerce Commission, either in its Docket No. 17000, or in the proceeding under § 13 of the Interstate Commerce Act which the plaintiffs (appellees) had

country as a whole, and to the maintenance of an adequate system of transportation. In the progress of such investigation the Commission shall, from time to time, and as expeditiously as possible, make such decisions and orders as it may find to be necessary or appropriate upon the record then made in order to place the rates upon designated classes of traffic upon a just and reasonable basis with relation to other rates. Such investigation shall be conducted with due regard to other investigations or proceedings affecting rate adjustments which may be pending before the Commission." 43 Stat. 801.

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petitioned the Interstate Commerce Commission to institute, determined the question of unjust discrimination with respect to interstate commerce, and until the further order of the court.

It should be observed at the outset that there is no contention on the part of the carriers that the intrastate rates fixed by the State Commission are confiscatory. There is no challenge of the authority of the State Commission under the Constitution and laws of the state to prescribe these rates for intrastate traffic, or of the validity or regularity of the proceedings which resulted in the order of the State Commission, aside from the alleged effect upon interstate commerce.

The question of the control of the state, as against an objection of this sort, over rates for transportation exclusively intrastate was considered in the *Minnesota Rate Cases* (1913) 230 U. S. 352, 57 L. ed. 1511, 33 Sup. Ct. Rep. 729, 48 L.R.A.(N.S.) 1151, Ann. Cas. 1916A, 18. The state of Minnesota had established rates for intrastate transportation throughout the state, and the complaining carriers insisted that by reason of the passage of the Interstate Commerce Act the state could no longer exercise the untrammelled statewide authority that it had formerly enjoyed in prescribing reasonable intrastate rates, and that the scheme of rates which Minnesota had prescribed, even if found to be otherwise not subject to attack, was void because of their injurious effect upon interstate commerce. There had been no finding by the Interstate Commerce Commission of unjust discrimination against interstate commerce by reason of the intra-

state rates and, reserving the question of the validity and consequence of such a finding if one were made by the Interstate Commerce Commission, the court decided that there was no ground for invalidating the action of the state. Dealing with the interblending of operations in the conduct of interstate and local business by interstate carriers, the court said that these considerations were for the practical judgment of Congress, and that if adequate regulation of interstate rates could not be maintained without imposing requirements as to such intrastate rates as substantially affected the former, it was for Congress, within the limits of its constitutional authority over interstate commerce, to determine the measure of the regulation it should apply. It was not the function of the court to provide a more comprehensive scheme of regulation than Congress had decided upon, nor, in the absence of Federal action, to deny effect to the laws of the state enacted within the field which it was entitled to occupy until its authority was limited through the exertion by Congress of its paramount constitutional power. On the assumption that § 3 of the Interstate Commerce Act should be construed as applicable to unreasonable discriminations between localities in different states, as well when arising from an intrastate rate as compared with an interstate rate as when due to interstate rates exclusively, the court was of the opinion that the controlling principle governing the enforcement of the act should be applied to such cases and that the question of the existence of such a discrimination would be primarily for the investigation and deter-

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mination of the Interstate Commerce Commission and not for the courts. (Minnesota Rate Cases, *supra*, at p. 419 of 230 U. S.).

The controlling principle, thus invoked, was derived from a consideration of the nature of the question and of the inquiry and action required for its solution. The inquiry would necessarily relate to technical and intricate matters of fact, and the solution of the question would demand the exercise of sound administrative discretion. The accomplishment of the purpose of Congress could not be had without the comprehensive study of an expert body continuously employed in administrative supervision. Only through the action of such a body could there be secured the uniformity of ruling upon which appropriate protection from unreasonable exactions and unjust discriminations must depend. (Minnesota Rate Cases, *supra* at pp. 419, 420, of 230 U. S. See Great Northern R. Co. v. Merchants Elevator Co. (1922) 259 U. S. 285, 291, 66 L. ed. 943, 42 Sup. Ct. Rep. 477.)

The application of this principle had frequent illustration before the question arose as to unjust discriminations against interstate commerce through the fixing of intrastate rates. In Texas & P. R. Co. v. Abilene Cotton Oil Co. (1907) 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075, the court decided that a shipper could not maintain an action because of the exaction of an alleged unreasonable rate on interstate shipments, when the rate had been duly filed and published by the carrier and had not been found to be unreasonable by the Interstate Commerce Commission. The court found an indis-

soluble unity between the provision for the maintenance of rates as established in accordance with the statute and the prohibitions against preferences and discriminations, and declared that to maintain the just relation which the statute was intended to conserve it was essential that there should be uniformity of decision and that redress should be sought primarily through the administrative powers entrusted to the Interstate Commerce Commission. In Baltimore & O. R. Co. v. United States *ex rel.* Pitcairn Coal Co. (1910) 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164, complaint was made by the coal company of the method of distribution of coal cars, which was said to amount to an unjust discrimination. The court considered the controversy to be controlled by the decision in the Abilene Case, *supra*, and that the grievances of which complaint was made were primarily within the administrative competency of the Interstate Commerce Commission. The court said that the amendments of 1906 of the Interstate Commerce Act rendered, if possible, more imperative the construction which had been given to the act in this respect. After adverting to the case of Interstate Commerce Commission v. Illinois C. R. Co. (1910) 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155, the court again pointed out "the destructive effect upon the system of regulation devised by the act to regulate commerce," if it were construed as "giving authority to the courts, without the preliminary action of the Commission, to consider and pass upon the administrative questions which the statute has primarily confided to that body." (*Supra*, at p. 496 of

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215 U. S.) The question was again considered in *Robinson v. Baltimore & O. R. Co.* (1912) 222 U. S. 506, 56 L. ed. 288, 32 Sup. Ct. Rep. 114, where the court held that no action for reparation for discriminatory exactions for freight payments could be maintained in any court, Federal or state, in the absence of an appropriate finding and order of the Interstate Commerce Commission. Referring to the *Abilene Case*, *supra*, the court said, "It is true . . . that in that case the complaint against the established rate was that it was unreasonable, while here the complaint is that the rate was unjustly discriminatory. But the distinction is not material." (*Supra*, at p. 511 of 222 U. S.)²

The grounds for invoking this principal of preliminary resort to the Interstate Commerce Commission are even stronger when the effort is made to invalidate intrastate rates upon the ground of unjust discrimination against interstate commerce. Not only are the questions as to the effect of intrastate rates upon interstate rates quite as intricate as those relating to discrimination in interstate rates, not only is there at least an equal need for the comprehensive, expert and continuous study of the Interstate Commerce Commission, and for the uni-

formity obtainable only through its action, but in addition there is involved a prospective interference with state action within its normal field, in relation to the domestic concern of transportation exclusively intrastate. The court found no warrant for the contention that Congress in enacting the Interstate Commerce Act intended that there should be such an interference before the fact of unjust discrimination had been established by competent inquiry on the part of the administrative authority to which Congress had entrusted the solution of that class of questions.

What was lacking in the *Minnesota Rate Cases* (1913) 230 U. S. 352, 57 L. ed. 1511, 33 Sup. Ct. Rep. 729, 48 L.R.A.(N.S.) 1151, Ann. Cas. 1916A, 18, had been supplied in the *Shreveport Case*.³ There, the Interstate Commerce Commission had found that there was an unjust discrimination arising out of the relation of intrastate rates, maintained under state authority, to interstate rates which had been upheld as reasonable. The court decided that Congress in exercising its constitutional authority could correct the evil of this discrimination against interstate commerce and that in so doing Congress was entitled to secure the mainte-

² See, also, *United States v. Pacific & A. R. & Nav. Co.* (1913) 228 U. S. 87, 107, 108, 57 L. ed. 742, 33 Sup. Ct. Rep. 443; *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.* (1913) 230 U. S. 247, 259, 57 L. ed. 1472, 33 Sup. Ct. Rep. 916; *Texas & P. R. Co. v. American Tie & Timber Co.* (1914) 234 U. S. 138, 147, 58 L. ed. 1255, 34 Sup. Ct. Rep. 885; *Pennsylvania R. Co. v. Puritan Coal Mining Co.* (1915) 237 U. S. 121, 131, 59 L. ed. 867, 35 Sup. Ct. Rep. 484; *Pennsylvania R. Co. v. Clark Bros. Coal Mining Co.* (1915) 238 U. S. 456, 469, 59 L. ed. 1406, 35 Sup. Ct. Rep. 896; *Northern P. R. Co. v. Solum* (1918) 247 U. S. 477, 483, 62 L. ed. 1221, 38 P.U.R.1930C.

Sup. Ct. Rep. 550; *Director General of Railroads v. Viscose Co.* (1921) 254 U. S. 498, 504, 65 L. ed. 372, 41 Sup. Ct. Rep. 151; *Great Northern R. Co. v. Merchants Elevator Co.* (1922) 259 U. S. 285, 291, 295, 66 L. ed. 943, 42 Sup. Ct. Rep. 477; *Terminal R. Asso. v. United States* (1924) 266 U. S. 17, 31, 69 L. ed. 150, 45 Sup. Ct. Rep. 5; *Western & A. R. Co. v. Georgia Pub. Service Commission* (1925) 267 U. S. 493, 497, 69 L. ed. 753, P.U.R.1925D, 100, 45 Sup. Ct. Rep. 409.

³ *Houston, E. & W. T. R. Co. v. United States* (1914) 234 U. S. 342, 58 L. ed. 1341, 34 Sup. Ct. Rep. 833.

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nance of its own standard of interstate rates. Having this power, Congress could provide for its exercise through the aid of a subordinate body. The removal of the discrimination was within the authority granted to the Interstate Commerce Commission and the decision rested upon the ground that this authority had been exercised. (*Supra*, at pp. 357, 358 of 234 U. S.) See, also *American Express Co. v. State ex rel. Caldwell* (1917) 244 U. S. 617, 625, 61 L. ed. 1352, P.U.R.1917F, 45, 37 Sup. Ct. Rep. 656; *Illinois C. R. Co. v. Public Utilities Commission* (1918) 245 U. S. 493, 506, 62 L. ed. 425, P.U.R. 1918C, 279, 38 Sup. Ct. Rep. 170; *Arkansas R. Commission v. Chicago, R. I. & P. R. Co.* (1927) 274 U. S. 597, 599, 71 L. ed. 1221, 47 Sup. Ct. Rep. 724.

In the Transportation Act, 1920 (41 Stat. 484) Congress enacted express provisions with respect to intrastate rates, regulations, and practices. (*Id.* § 416.) Amending § 13 of the Act to Regulate Commerce, Congress authorized the Interstate Commerce

Commission to confer with state regulatory bodies with respect to "the relationship between rate structures and practices of carriers subject to the jurisdiction of such state bodies and of the Commission," and to hold joint hearings. It was provided that whenever in any such investigation, after full hearing, the Commission finds that any rate, regulation, or practice "causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful," the Commission shall prescribe the rate, regulation, or practice "thereafter to be observed, in such manner as, in its judgment, will remove" the discrimination. The order of the Commission is to bind the carriers, parties to the proceeding, "the law of any state or the decision or order of any state authority to the contrary notwithstanding."⁴

⁴The text of the provisions thus added to § 13 is as follows:

"Sec. 13.
"(3) Whenever in any investigation under the provisions of this act, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any state, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the state or states interested to be notified of the proceeding. The Commission may confer with the authorities of any state having regulatory jurisdiction over the class of persons and corporations subject to this act with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such state bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such state regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a state is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the co-operation, services, records, and facilities of such state authorities in the enforcement of any provision of this act.
"(4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and de-

powered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such state regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a state is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the co-operation, services, records, and facilities of such state authorities in the enforcement of any provision of this act.

"(4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and de-

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There can be no doubt that Congress thus intended to recognize and incorporate in legislative enactment the principle of the Shreveport Case, *supra*.⁵ We find no basis for the conclusion that it was the purpose of Congress to interdict a state rate, otherwise lawfully established for transportation exclusively intrastate, before appropriate action by the Interstate Commerce Commission. On the contrary, Congress sought to provide

clared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any state or the decision or order of any state authority to the contrary notwithstanding."

⁵ In presenting these amendments to the Committee of the Whole House, Mr. Esch, Chairman of the Committee on Interstate and Foreign Commerce of the House of Representatives, said:

"We also provide for the enactment into law of what is popularly known as the decision of the Supreme Court in the Shreveport Case. Where intrastate rates constitute an undue burden, advantage, preference, or prejudice against interstate rates, such rates are declared to be unlawful. We have incorporated into law the decision of the court. When by reason of the low level of the intrastate rates an undue burden is cast upon the interstate traffic the citizens and the shippers of other states are compelled to pay higher interstate freight rates than they would have had to pay had that state enacted or put into force and effect proper intrastate rates. We give this power of determination to the Interstate Commerce Commission, but in order that the State Commissions may have a proper hearing we provide that the State Commissions may, to use a phrase of the street, 'sit in' with the Interstate Commerce Commission. It can sit with the Interstate Commerce Commission; it can hear the testimony, and can present its full case, through its legally constituted authority. It can present the full case, but the final adjudication is to rest with the Interstate Commerce Commission and not with the state regulatory body. We believe that this getting

a more satisfactory administrative procedure which would elicit the co-operation of the state regulatory bodies, and insure a full examination of all the questions of fact which such bodies might raise, before any finding was made in such a case as to unjust discrimination against interstate commerce or any order was entered superseding the rate authorized by the state. In sustaining the authority of the Commission under § 13 as thus

together of the interstate and state regulatory bodies will lessen the number of Shreveport cases, better the feeling between the interstate and the State Commissions, and promote the commercial interests of the country." Cong. Rec. 66th Cong. 1st Sess. Vol. 58, pt. 8, p. 8317.

Senator Cummins, Chairman of the Committee on Interstate Commerce of the Senate, made the following statement to the Committee of the Whole of the Senate:

"I need not follow that case (the Shreveport Case) in all its phases; but it finally reached the Supreme Court of the United States, and the Supreme Court held that the authority of the Federal Government as it could be vested in the Interstate Commerce Commission extended to the removal of a discrimination between the interstate rates and the intrastate rates, but no authority had been given by Congress to the Commission to declare what the intrastate rate should be in comparison with the interstate rate. . . .

"The committee has attempted simply to express the decisions of the Supreme Court of the United States. We have not attempted to carry the authority of Congress beyond the exact point ruled by the Supreme Court in the cases to which I have referred; and the only thing we have done in the matter has been to confer upon the Interstate Commerce Commission the authority to remove the discrimination when established in a proper proceeding before that body—an authority which it does not now have. . . .

"The Supreme Court held that Congress had not conferred upon the Interstate Commerce Commission the right to prescribe a rate in the stead of one which had been condemned; but so far as the condemnation of the rates is concerned, the power of the Interstate Commerce Commission is already ample, and it has succeeded in one way or another in removing the discriminations which have come under its notice without the statute which we now propose." Cong. Rec. 66th Cong. 2d Sess. Vol. 59, pt. 1, pp. 142, 143.

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amended, the court said in *Wisconsin R. Commission v. Chicago, B. & Q. R. Co.* (1922) 257 U. S. 563, 590, 591, 66 L. ed. 371, P.U.R.1922C, 200, 214, 42 Sup. Ct. Rep. 232: "It is said that our conclusion gives the Commission unified control of interstate and intrastate commerce. It is only unified to the extent of maintaining efficient regulation of interstate commerce under the paramount power of Congress. It does not involve general regulation of intrastate commerce. Action of the Interstate Commerce Commission in this regard should be directed to substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce, and must leave appropriate discretion to the state authorities to deal with intrastate rates as between themselves on the general level which the Interstate Commerce Commission has found to be fair to interstate commerce." See *Arkansas R. Commission v. Chicago, R. I. & P. R. Co.* (1927) 274 U. S. 597, 71 L. ed. 1221, 47 Sup. Ct. Rep. 724.

When, before the amendments of 1910 of the Interstate Commerce Act, the question arose as to the propriety of judicial action in granting injunctions against the maintenance of interstate rates, filed and published by carriers as provided by law, pending the decision of the Interstate Commerce Commission whether such rates were unreasonable or unjustly discriminatory, there was a conflict of opinion

in the lower Federal courts, but the weight of decision was that such relief, although temporary in character, could not be granted prior to an appropriate finding by the Interstate Commerce Commission, and this ruling accorded with the principle declared by this Court in the *Abilene* and other cases, *supra*.⁶ Congress, in 1910, authorized the Interstate Commerce Commission, on the filing of rates by interstate carriers with the Commission, to suspend the operation of the rates for a stated period, and this provision has been continued in later legislation. Interstate Commerce Act, § 15 (7); 36 Stat. 552; 41 Stat. 486, 487. This power of suspension was entrusted to the Commission only. There is no similar provision for the suspension of intrastate rates established by state authority.

[1, 2] It is said that the interlocutory injunction, granted below, was in aid of the proceedings pending before the Interstate Commerce Commission. But the injunction necessarily has the effect of preventing the state from enforcing the rates it has prescribed, which are lawful rates until the Interstate Commerce Commission finds that they cause an unjust discrimination against interstate commerce. A judicial restraint of the enforcement of intrastate rates, although limited to the pendency of proceedings before the Interstate Commerce Commission, is none the less essentially a restraint upon the power of the state

⁶ See *Atlantic Coast Line R. Co. v. Macon Grocery Co.* (1909) 92 C. C. A. 114, 166 Fed. 206; *Columbus Iron & Steel Co. v. Kanawha & M. R. Co.* (1910) 101 C. C. A. 621, 178 Fed. 261; *Wickwire Steel Co. v. New York C. & H. R. Co.* (1910) 104 C. C. A. 504, 181 Fed. 316. Compare *Jewett Bros. & Jewett v. Chicago, M. & St. P. R. Co.*

(1907) 156 Fed. 160; *Kiser Co. v. Central of Georgia R. Co.* (1907) 158 Fed. 193; (1916) 236 Fed. 573; *Northern P. R. Co. v. Pacific Coast Lumber Mfrs' Asso.* (1908) 91 C. C. A. 39, 165 Fed. 1; *Great Northern R. Co. v. Kalispell Lumber Co.* (1908) 91 C. C. A. 63, 165 Fed. 25.

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to establish rates for its internal commerce, a power the exercise of which in prescribing rates otherwise valid is not subject to interference upon the sole ground of injury to interstate commerce, save as Congress has validly provided. Congress has so provided only in the event that, after full hearing in which the state authorities may participate, the Interstate Commerce Commission finds that unjust discrimination is created. Congress forbids the unjust discrimination through the fixing of intrastate rates but entrusts the appropriate enforce-

ment of its prohibition primarily to its administrative agency.

It is urged that the restraining power of the court is needed to prevent irreparable injury. But, in this class of cases, the questions whether there is injury, and what the measures shall be to prevent it, is committed for its solution preliminarily to the Interstate Commerce Commission.

For these reasons, the order of the district court is reversed and the cause remanded with direction to dismiss the bill of complaint.

It is so ordered.

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Broad River Power Company et al.

v.

State of South Carolina ex rel.

John M. Daniel

[No. 528.]

(— U. S. —, — L. ed. —, — Sup. Ct. Rep. —.)

Constitutional law — Property rights — Service under consolidated franchises.

1. It is within the constitutional power of the state to refuse to permit any partial abandonment by a combined street railway and light utility of its consolidated franchises through the discontinuance of its street railway service, where the act of the state permitting such consolidation was based upon the agreement of the combined utility to conduct both services as one business, and where the business has in fact been so conducted, p. 237.

Service — Duty to serve — Effect of merger legislation.

2. A merger act permitting the consolidation, sale, or transfer of utility properties cannot be taken to authorize the breaking up of a unified franchise of a combination street railway and light company in such a manner as to relieve it or any successor company from its duties and obligations to serve as they existed before the merger, especially where there is no expressed purpose in such legislation to relieve any of the corporations of existing duties and obligations or to enlarge their privileges, p. 239.

[May 19, 1930.]

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CERTIORARI to review a judgment of the Supreme Court of South Carolina requiring a consolidated street railway and power company to resume the operations of a street railway service previously abandoned; affirmed. For case below see — S. C. —, P.U.R.1930A, 65, — S. E. —.

Mr. Justice STONE delivered the opinion of the Court:

This case is here on certiorari to review a judgment of the supreme court of South Carolina, adjudging the petitioners, the Broad River Power Company and its subsidiary, the Columbia Railway Gas & Electric Company, to be jointly responsible for the operation of an electric street railway system in Columbia, South Carolina, and directing them to resume its operation, which they had abandoned. — S. C. —, P.U.R.1930A, 65, — S. E. —. The proceeding, in the nature of mandamus, was brought in the state supreme court to compel the operation of the system by petitioners. By their answer they set up that the railway was being operated by the railway company at a loss under a franchise separate and distinct from the franchise to make and distribute electric light and power of the Broad River Power Company, whose business is concededly profitable; that the continued operation of the railway under compulsion of the court would deprive respondents of their property without due process of law in violation of the Fourteenth Amendment of the Federal Constitution.

The supreme court, upon consideration of the evidence taken before a referee, held (a) that although the books of the street railway showed large financial losses, it could be operated at a profit if properly managed; P.U.R.1930C.

(b) that the charter and certain city ordinances under which the street railway system was constructed and operated, and certain extension-line and right-of-way agreements, are effective as contracts imposing on petitioners a duty to operate the system; and, (c) that the privilege of operating the street railway is inseparable from that of operating the electric power and light system, and that together they constitute a unified franchise, which cannot be abandoned in part and retained in part without the consent of the state; that so long as respondents retain and operate their electric power system they cannot be permitted to abandon their street railway system. Each of these conclusions is sharply challenged by respondents, but, in the view we take, only the third need be considered here.

Whether the state court has denied to rights asserted under local law the protection which the Constitution guarantees is a question upon which the petitioners are entitled to invoke the judgment of this court. Even though the constitutional protection invoked be denied on non-federal grounds, it is the province of this court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus evaded. *Fox River Paper Co. v. Railroad Commission* (1927) 274 U. S. 651, 655, 71 L. ed. 1279, 47 Sup.

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Ct. Rep. 669; *Ward v. Love County* (1920) 253 U. S. 17, 22, 64 L. ed. 751, 40 Sup. Ct. Rep. 419; *Enterprise Irrig. District v. Farmers Mut. Canal Co.* (1917) 243 U. S. 157, 164, 61 L. ed. 644, 37 Sup. Ct. Rep. 318. But if there is no evasion of the constitutional issue, *Nickel v. Cole* (1921) 256 U. S. 222, 225, 65 L. ed. 900, 41 Sup. Ct. Rep. 467; *Vandalia R. Co. v. Indiana ex rel. South Bend* (1907) 207 U. S. 359, 367, 52 L. ed. 246, 28 Sup. Ct. Rep. 130; and the non-federal ground of decision has fair support, *Fox River Paper Co. v. Railroad Commission*, *supra*, 657; *Enterprise Irrig. District v. Canal Co.* *supra*; *Leathe v. Thomas* (1907) 207 U. S. 93, 52 L. ed. 118, 28 Sup. Ct. Rep. 30; *Vandalia R. Co. v. Indiana ex rel. South Bend*, *supra*; *Sauer v. New York* (1907) 206 U. S. 536, 51 L. ed. 1176, 27 Sup. Ct. Rep. 686, this court will not inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule, for that of the state court.

The predecessor in interest of the Columbia Electric Gas & Railway Company, the petitioner, was incorporated in 1890 by special act of the legislature, S. C. Acts of 1890, p. 969, under the name of Columbia Electric Street & Suburban Railway & Electric Power Company, later changed to the Columbia Electric Street Railway Light & Power Company, called the Consolidated Company and, still later, in 1911, changed to its present name. Its corporate life was fixed at thirty years and it was given power, upon the consent of the city council, to construct or acquire railway tracks through any streets of the city of Co-

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lumbia, to extend them into the country a distance of 5 miles from the state capital, and to operate cars with electric power over its tracks for the transportation of passengers and freight and to contract for and provide electric power for any other purpose. The act was continued in force provided the "Company begins to operate its railways in said city within five years."

An act of December 16, 1891, S. C. Acts of 1891, p. 1453, authorized the consolidation of this company with the Congaree Gas & Electric Company. The latter had been incorporated under the Act of December 24, 1887, S. C. Acts of 1887, p. 1103, for a period of thirty years, with the power, not now involved, to manufacture and distribute gas, and power to sell and distribute light, power, and heat "made from electricity," and for that purpose, subject to municipal ordinances, to erect poles and conductors. The Consolidation Act recited that these two companies had agreed to consolidate their franchises and privileges and authorized them to do so by transfer of their property, franchises, and privileges by deed of indenture to the new consolidated company. This company was incorporated for fifty years, with the usual corporate powers. The act provided that it should be vested with the franchises and subject to the liabilities of the consolidated companies. It was also authorized to acquire the property and franchise of the Columbia Street Railway Company, incorporated for thirty years by act of February 9, 1882, with a franchise to operate horse cars over tracks in the city streets.

The consolidation was effective as

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authorized. The Consolidated Company acquired the line of street railway of the horse car company, established electric power plants and, under authority of City Ordinance, §§ 561, 562, of 1892, laid additional tracks and electrified the system by erecting poles and wires in the streets, also, so far as practicable, using them and its rights of way in its electric light and power business. From the organization of the Consolidated Company until 1925, both the street railway and power business of the Consolidated Company were expanded as a single business, its capital stock was increased from time to time, and the system of accounts was such that it did not disclose whether its power system was constructed more from the proceeds of its street railway or its power business.

Certain facts in this recital of corporate history are of persuasive if not controlling significance in determining the status of the franchise of the Consolidated Company. The Consolidated Company was a new corporation. Its franchises and privileges were granted for its corporate life, extending beyond the duration of the franchises of the two companies consolidated, all of which would have expired before 1921. It had acquired the franchises of the two consolidated companies, one in terms a franchise to operate a railway and a power system, the railway system being for practical purposes dependent upon the power system for its operation, and the privilege of operating both being conditional upon the establishment of the railway system within five years. The Consolidation Act plainly looked to a consolidation of the franchises by P.U.R.1930C.

the two companies. None of the special legislative acts defining the privileges conferred upon these several corporations contains any words affirmatively providing that any part of the privileges granted should be deemed separable, or that they might be exercised independently of any other.

[1] The supreme court of South Carolina, in referring to this corporate history and the effect of the Consolidation Act said, p. 84 of P.U.R.1930A: "When the new company, in compliance with this act, effected the consolidation and in pursuance of the provisions of the act built, constructed, and operated 'its electric railway, light, and power properties as parts of one business for nearly forty years,' these rights, powers, and privileges became inseparably bound together and cannot be separated. As contended by the petitioners [respondents here], 'such diversity as there was in the conditions of the former franchises became obliterated and extinguished by the major purpose of the new act, namely, the consolidation of all the powers into one company for the greater benefit of the public.'"

In the light of the familiar rule that franchises are to be strictly construed, and that construction adopted which works the least harm to the public, see *Blair v. Chicago* (1906) 201 U. S. 400, 471, 50 L. ed. 801, 26 Sup. Ct. Rep. 427; *Northwestern Fertilizing Co. v. Hyde Park* (1878) 97 U. S. 659, 666, 24 L. ed. 1036; *Slidell v. Grandjean* (1884) 111 U. S. 412, 28 L. ed. 321, 4 Sup. Ct. Rep. 475, we cannot say that this interpretation of statutes of the state of South Carolina, by its highest court, so departs

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from established principles as to be without substantial basis, or presents any ground for the protection, under the Constitution, of rights or immunities which the state court has found to be non-existent. It follows that it was within the constitutional power of the state to refuse to permit any partial abandonment of the consolidated franchise. *United Fuel Gas Co. v. Railroad Commission* (1929) 278 U. S. 300, 308, 73 L. ed. 390, P.U.R. 1929A, 433, 49 Sup. Ct. Rep. 150; *Fort Smith Light & Traction Co. v. Bourland* (1925) 267 U. S. 330, 69 L. ed. 631, P.U.R.1925C, 604, 45 Sup. Ct. Rep. 249; *Puget Sound Traction, Light & P. Co. v. Reynolds* (1917) 244 U. S. 574, 61 L. ed. 1325, P.U.R.1917F, 57, 37 Sup. Ct. Rep. 705; *Chesapeake & O. R. Co. v. Public Service Commission* (1917) 242 U. S. 603, 61 L. ed. 520, 37 Sup. Ct. Rep. 234; *Missouri P. R. Co. v. Kansas ex rel. Taylor* (1910) 216 U. S. 262, 377, 54 L. ed. 472, 30 Sup. Ct. Rep. 330. See *People ex rel. Woodhaven Gas Light Co. v. Public Service Commission* (1925) 269 U. S. 244, 70 L. ed. 255, P.U.R.1925E, 827, 46 Sup. Ct. Rep. 83; *People ex rel. New York & Q. Gas Co. v. McCall* (1917) 245 U. S. 345, 62 L. ed. 337, P.U.R. 1918A, 792, 38 Sup. Ct. Rep. 122; *Atlantic Coast Line R. Co. v. North Carolina Corp. Commission* (1907) 206 U. S. 1, 25, 51 L. ed. 933, 27 Sup. Ct. Rep. 585.

Brooks-Scanlon Co. v. Railroad Commission (1920) 251 U. S. 396, 64 L. ed. 323, P.U.R.1920C, 579, 40 Sup. Ct. Rep. 183, upon which petitioners rely, is not apposite. It was there held that where a railroad serving the public is owned and operated

by a corporation which also conducted a private business, it is the business of the Railroad and not the entire business of the Company which determined whether the Railroad franchise may be abandoned as unprofitable. The private business was not devoted to a public use or a part of the public franchise. Nor, as petitioners contend, are we here concerned with the rule that a public service company may not be compelled to serve, even in a branch of its business, at a rate which is confiscatory. See *Northern P. R. Co. v. North Dakota ex rel. McCue* (1915) 236 U. S. 585, 59 L. ed. 735, P.U.R.1915C, 277, 35 Sup. Ct. Rep. 429, L.R.A.1917F, 1148, Ann. Cas. 1916A, 1. The order compelling petitioners to serve does not involve a determination whether or not the rate is confiscatory, nor does it foreclose a consideration of that question upon appropriate proceedings. *People ex rel. Woodhaven Gas Light Co. v. Public Service Commission*, *supra*, 249.

But petitioners contend that even if the franchise of the Consolidated Company be deemed a unified one, that the privilege of operating the street railway system was separated from the franchise to operate the power system by the corporate reorganization under the so-called Merger Act of March 19, 1925, S. C. Acts of 1925, p. 842. The passage of this act was procured by those interested in promoting the interests of the Consolidated Company and its subsidiaries, apparently for the purpose of facilitating the financing of the power business apart from the street railway business. It is entitled "An Act to authorize" the Consolidated and

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six other named companies, or any of them, "to merge, consolidate or sell, transfer, and convey all or any part of their respective properties, assets, franchises, and charter or other rights to any one or more of them or to the Broad River Power Company . . . and to authorize the Broad River Power Company or any one or more of them to merge, consolidate, or purchase the same, and to vest in the said Broad River Power Company or any other of said companies the property, assets, franchises, and charter or other rights so sold, transferred, conveyed, merged, consolidated, or purchased. . . ."

[2] Section 1, entitled "Merger of certain corporations authorized," permits the named companies or any of them "to merge or consolidate with or to sell, transfer, and convey to any one or more of them or to the Broad River Power Company all or any part of their respective properties, assets, franchises . . . and each and every of said companies and the Broad River Power Company are hereby authorized to merge or consolidate with or to purchase and to receive and hold all or any part of the properties, assets, franchises . . . so sold, transferred, and conveyed. . . ." Section 2 declares: "That in furtherance of the purposes of § 1 . . . all franchises heretofore granted by the state to any of the said companies may be transferred and assigned in pursuance of the provisions of § 1 of this act," and that the company to which the transfer is made "shall hold the same with all the rights, powers, and privileges granted to the original holder thereof, subject only to the restrictions, requirements,

and conditions in said franchises contained."

The Broad River Power Company had been organized in July, 1924, for the purpose of acquiring the entire outstanding capital stock of the Consolidated Company. Proceeding under the Merger Act, all the property and franchises of the six subsidiaries, excepting only the street railway property and so much of its franchises as authorized it to operate and maintain its street railway system, were vested in the Broad River Company. That company thus acquired the entire power business, leaving only the street car business and property in the Consolidated Company. The deed, however, expressly conveyed to the Broad River Power Company all its poles, including those used for the street railway, which carried both the trolley wires for the operation of the street railway and those for the transmission of other electric power. The Broad River Power Company then issued its own stock to the extent of approximately three and a half million dollars in exchange for the common stock of the Consolidated Company and one of its subsidiaries, and for certain cash subscriptions. After the acquisition of the common stock of the Consolidated Company by the Broad River Company, the capital stock of the former was reduced to a relatively nominal amount, all of which was held by the Broad River Company except 190 shares of preferred stock which remained outstanding. The record indicates that the petitioners have deposited a fund in a special bank account for the retirement of this stock. Since this reorganization the same persons have been executive officers of

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the Broad River Company and the Consolidated Company, and for all practical purposes the railway business of the Consolidated Company has been carried on as a branch or department of the Broad River Power Company.

Upon these and more detailed findings of fact, both the referee and the state court held that the reorganization resulted in a merger by which all the properties and franchises of the several companies concerned were brought under the complete domination and control of the Broad River Power Company, which carried on the street railway branch of its business through the merely nominal agency of the Consolidated Company. For that reason the Supreme Court reached the conclusion that there had been no effective splitting up of the franchise or the public obligations of the Consolidated Company, and that they had devolved upon the Broad River Power Company, which was liable to carry out the obligation of the Columbia Gas & Electric Company to furnish an electric street railway service.

But we need not consider this aspect of the case, for we think that there was substantial basis for the further conclusion of the state court that the Merger Act cannot be taken to authorize the breaking up of the unified franchise of the Consolidated Company in such manner as to relieve it or any successor company from its duties and obligations as they existed before the merger. Nowhere in this legislation is there any affirmative disclosure of a purpose to relieve any of the corporations of existing duties and obligations or to enlarge their privi-

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leges. As appears from the title of the act and also that of § 1, the dominant purpose was to effect a merger or consolidation. The authority given by § 1 to transfer "all or any part" of the franchises affords but slender basis for the argument that there was any purpose to effect such a separation. The use of this phrase seems only subsidiary to the dominant purpose to authorize a merger or consolidation. It is not repeated or in terms referred to in § 2, which deals with franchises, and it is declared to be in furtherance of the purpose of § 1. In any case, the limitation in this section that the company acquiring any franchise shall take it subject to existing restrictions, requirements and conditions may, we think, reasonably be deemed to preclude the possibility of relieving from franchise duties and obligations when no such purpose is disclosed in the body of the legislative act.

The very fact that legislative acts of this character are commonly prepared by those interested in the benefits to be derived from them, and that the public interest requires that they should be in such unequivocal form that the legislative mind may be impressed with their character and import so that privileges may be intelligently granted or purposely withheld, has firmly established the rule that they must be strictly construed, and that any ambiguity or doubts as to their meaning and purpose must be resolved in favor of the public interest. See *Blair v. Chicago* (1906) 201 U. S. 400, 471, 50 L. ed. 801, 26 Sup. Ct. Rep. 427; *Northwestern Fertilizing Co. v. Hyde Park* (1878) 97 U. S. 659, 666, 24 L. ed. 1036. "The

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rule is a wise one; it serves to defeat any purpose concealed by the skillful use of terms to accomplish something not apparent on the face of the act and thus sanctions only open dealing with legislative bodies." *Slidell v. Grandjean* (1884) 111 U. S. 412,

438, 28 L. ed. 321, 4 Sup. Ct. Rep. 475.

We conclude that the judgment below is supported by a state ground which we may rightly accept as substantial.

Dismissed.

UNITED STATES SUPREME COURT,

Georgia Power Company

v.

City of Decatur

[No. 363.]

(— U. S. —, — L. ed. —, — Sup. Ct. Rep. —.)

Appeal and review — Presumption favoring state courts — Rate contracts.

1. The Supreme Court of the United States accepted the rulings of the highest court of a state as to whether or not under the statutes of that state a rate contract between a utility and municipality of the state was yet legally effective, p. 243.

Constitutional law — Confiscation — Unprofitable rate contract.

2. An injunction was refused against a judgment of a state court requiring a street railway to continue service at a fixed rate of fare, notwithstanding an alleged confiscation of the utility's property because of the fact that it was losing money, where a contract fixing such a rate between the carrier and a municipality in that state was still in force, p. 244.

[May 19, 1930.]

CERTIORARI to review a judgment of the Supreme Court of Georgia requiring a street railway to continue service under a contract fixing a specified rate of fare; affirmed. For case below see 168 Ga. 705, P.U.R.1929C, 460, 149 S. E. 32.

Mr. Justice BUTLER delivered the opinion of the Court:

The city of Decatur brought this suit in the superior court of DeKalb county against the Georgia Railway & Electric Company and the Georgia Railway & Power Company. The

former was the owner and the latter was the lessee and operator of a system of street and suburban railway lines of more than 200 miles serving Atlanta, Decatur, and other places in that part of Georgia. Before trial, they consolidated and became the

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Georgia Power Company, and it was made the defendant. The city prayed, and the court granted, a decree permanently enjoining petitioner from violating an ordinance passed by the city March 3, 1903, from violating a contract of April 1, 1903, based upon the ordinance, and from ceasing to operate about a mile of its line in Decatur. The decree was affirmed by the state supreme court in 168 Ga. 705, P.U.R.1929C, 460, 149 S. E. 32.

Prior to the commencement of this suit it had been finally adjudged in litigation between the city and petitioner's predecessors that the ordinance and contract bound the carrier not to charge more than 5 cents per passenger between points on that stretch of track in Decatur and the terminus of the line in Atlanta and required it upon the payment of each full fare to give to the passenger a transfer ticket that would entitle him for one fare to ride between points on such track and points on any of the carrier's lines in Atlanta. It was also held that the State Railroad Commission was without authority to change rates that are established by contract. *Georgia R. & Power Co. v. Railroad Commission* (1919) 149 Ga. 1, P.U.R.1919D, 546, 98 S. E. 696, 5 A.L.R. 1; *Georgia R. & Power Co. v. Decatur* (1921) 152 Ga. 143, 108 S. E. 615; *Georgia R. & Power Co. v. Decatur* (1922) 153 Ga. 329, 111 S. E. 911; 262 U. S. 432, 67 L. ed. 1065, P.U.R.1923E, 387, 43 Sup. Ct. Rep. 613. The duration of the defendant's obligation to operate that line or to serve for such contract fare was not determined.

August 14, 1919, the Commission fixed the carrier's fares other than

those covered by the contract at 6 cents; September 22, 1920, P.U.R. 1921A, 165, it raised them to 7 cents, and December 15, 1927, P.U.R. 1928A, 830, it made them 10 cents per passenger but required the carrier to sell four tickets for 30 cents. The cost of the transportation covered by the contract fare, exclusive of any compensation for the use of property employed to furnish the service, exceeds the revenue derived therefrom and is substantially higher per passenger than the cost of service covered by the fares fixed by the Commission. An ordinance of the city of Decatur passed May 15, 1925, directed paving of the streets occupied by the line in question and the assessment of a substantial portion of the cost against the lessee. Thereupon lessor and lessee offered to surrender to the city the permit for the operation of the line and the lessee notified the city that at a time specified it would discontinue the service. The city refused to accept the surrender and promptly brought this suit.

Petitioner maintained below and here insists that the franchise and the rate contract expired August 16, 1919, and that its obligation to operate the line or keep the 5-cent fare in force was terminated by such offer and notice. See *Denver v. Denver Union Water Co.* (1918) 246 U. S. 178, 184, 62 L. ed. 649, P.U.R.1918C, 640, 38 Sup. Ct. Rep. 278. It contends that the rate is confiscatory, that the decree requires it to operate the line and to serve for the 5-cent fare and that, if compelled so to do, it will be deprived of its property without due process of law in violation of the Fourteenth Amendment.

GEORGIA POWER CO. v. DECATUR

This court has recently held that the usual permissive charter of a railroad company does not oblige the company to operate its railroad at a loss; that, where it is reasonably certain that future operation will be at a loss, the company, in the absence of contract obligation to continue, may cease, and if in such circumstances the company be compelled by the state to continue to operate at a loss, it would be deprived of its property without due process of law. *Texas R. Commission v. Eastern Texas R. Co.* (1924) 264 U. S. 79, 68 L. ed. 569, P.U.R. 1924C, 407, 44 Sup. Ct. Rep. 247. The state may not by any of its agencies disregard the prohibitions of the Fourteenth Amendment. *Chicago, B. & Q. R. Co. v. Chicago* (1897) 166 U. S. 226, 234, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *Raymond v. Chicago Union Traction Co.* (1907) 207 U. S. 20, 36, 52 L. ed. 78, 28 Sup. Ct. Rep. 7. We are, therefore, required to pass upon the merits of petitioner's claim. *Stearns v. Minnesota* (1900) 179 U. S. 223, 232, 45 L. ed. 162, 21 Sup. Ct. Rep. 73; *Ward v. Love County* (1920) 253 U. S. 17, 22, 64 L. ed. 751, 40 Sup. Ct. Rep. 419.

By an act of the Georgia legislature passed August 16, 1889 (Acts 1888-89, p. 211) the Collins Park & Belt Railroad Company was incorporated and empowered to construct and operate street railways in Atlanta, in other parts of Fulton county and in DeKalb and other counties. Subsequently, its name was changed to the Atlanta Rapid Transit Company. It applied for and the town of Decatur by ordinance passed September 4, 1899, granted to it a "franchise" to construct and operate the line in question.

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The act does not specify the term of the company's charter and there is nothing in it or in the ordinance to fix the duration of the carrier's obligation to operate the line. January 1, 1902, the Georgia Railway & Electric Company was incorporated for the term of 101 years and was empowered by the act under which it was organized to acquire and operate street and suburban railways. Acts 1892, p. 37. On March 28, 1902, the Atlanta Rapid Transit Company conveyed all its property to the last-mentioned company. March 3, 1903, the town of Decatur by ordinance granted the latter permission to discontinue operation and remove one of its Decatur lines upon the condition that it should continue to operate the stretch of track here involved and "never charge more than 5 cents for one fare" for the transportation above described. And April 1, 1903, the town and the company made a contract by which each agreed to do all the things required to be by it performed under the terms of the ordinance. October 16, 1911, the Georgia Railway & Power Company was incorporated as an interurban and street railroad company for the term of 101 years, and January 1, 1912, the Railway & Electric Company leased all its lines of railway and other property to the latter for a term of 999 years.

[1] It may be assumed, as contended by petitioner, that under the state law (Code, § 2215) the charter of the Collins Park Company expired August 16, 1919, thirty years after passage of the special Act, and that it was not bound by its franchise to continue to operate the line after that date. See *Turnpike Co. v. Illinois*

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(1877) 96 U. S. 63, 68, 24 L. ed. 651. The petitioner contends that the ordinance of September 4, 1899, was the only franchise for the operation of the line in question, and that the obligation to operate the line and maintain the contract fare ended with the expiration of the charter of the Collins Park Company.

But franchises for the construction and operation of street railway lines are granted by the state. And January 1, 1902, the state chartered the Georgia Railway & Electric Company. In this case the supreme court held (168 Ga. 705, 709, P.U.R.1929C, 460, 464, 149 S. E. 32) that under the state Constitution (Code, § 6448) "all that towns and cities have to give to the construction of street passenger railways within the limits of the same is the consent of the corporate authorities." And it held that by the contract of April 1, 1903, the city of Decatur gave its consent for the use of its streets by the electric company. We accept that court's construction of the acts of the legislature and the ordinance and its decision as to the effect of the contract of April 1, 1903. Upon the conveyance by the Atlanta Rapid Transit Company the system, including the Decatur line in question, passed to the Georgia Railway & Electric Company, to be operated under

the franchise granted to that company by the act of the legislature under which it was incorporated. It is clear that this franchise and the rate contract of April 1, 1903, are still in force.

[2] There is nothing in the ordinance or contract to indicate a purpose to terminate the obligation of the carrier in respect of the 5-cent fare while it continues to operate the line as part of its system under its present franchise (Fort Smith Light & Traction Co. v. Bourland (1925) 267 U. S. 330, 69 L. ed. 631, P.U.R. 1925C, 604, 45 Sup. Ct. Rep. 249), and the contract will continue to bind petitioner during the period intended by the parties unless earlier altered by them or relaxed by state authority. Georgia R. & Power Co. v. Decatur (1923) 262 U. S. 432, 438, 67 L. ed. 1065, P.U.R.1923E, 387, 43 Sup. Ct. Rep. 613. The losses attributable to the stretch of track in question and the 5-cent fare are immaterial while the rate contract continues. St. Cloud Pub. Service Co. v. St. Cloud (1924) 265 U. S. 352, 355, 68 L. ed. 1050, 44 Sup. Ct. Rep. 492; California R. Commission v. Los Angeles R. Corp. (1929) 280 U. S. 145, 152, 74 L. ed. —, P.U.R.1930A, 1, 50 Sup. Ct. Rep. 71.

Decree affirmed.

RE GENERAL RULES AND REGULATIONS FOR MOTOR CARRIERS

OKLAHOMA CORPORATION COMMISSION

Re General Rules and Regulations for Motor Carriers

[Cause No. 9518, Order No. 4912.]

Automobiles — General rules and regulations.

The Oklahoma Commission adopted and promulgated general rules and regulations covering the granting of certificates of public convenience and necessity for the operation of motor carriers over public highways and regulating their operations within the state.

[January 31, 1930.]

HEARING to consider advisability of adopting amendments or modifications to Order No. 4831; new regulations adopted.

By the COMMISSION: On the 27th day of November, 1929, the Corporation Commission of the state of Oklahoma gave general notice by publication in a newspaper of general circulation, located in the capital of Oklahoma City, that it would, on the 23rd day of December, 1929, at its court room in the Capitol in Oklahoma City, conduct a general hearing for the purpose of considering the advisability of adopting certain amendments or modifications to Order No. 4831, theretofore promulgated on October 14, 1929, in Cause No. 9518. The notice set forth the substance of the amendment to the last paragraph of Rule No. 31 of said Order No. 4831, substance of said amendment being as follows; to-wit:

"Amend the last paragraph of Rule 31 of Order No. 4831 so as to read as follows, to wit:

A Class "B" permit shall not authorize the transportation of freight
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between points served by Class "A" carriers, except for the transportation of household goods; office furniture in use; removal of entire stock of goods, wares, and merchandise, fixtures and equipment of an established business; building material and supplies to locations; oil field equipment and supplies; contents of carload shipments including distribution to one or more consignees; and such other commodities as may require special equipment or extraordinarily expeditious and rapid transportation; and any commodity which such Class "B" carrier may have held in storage in a warehouse owned or controlled by such carrier for at least one day prior to the beginning of such transportation, and at a rate not less than that charged by Class "A" carriers rendering service over said route.

Notice was further given that at the hearing to be conducted the Commission would consider such other

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and additional rules, regulations, requirements, or modifications of any of the rules theretofore adopted, as might be suggested or which the Commission upon its own initiative might consider advisable to adopt. On account of death in the family of the attorney for the Class "B" motor carriers, proposing the amendment set forth to Rule No. 31, it was necessary to continue the hearing from December 23, 1929, to January 3, 1930, at which time all interested parties appearing, the matter was heard and closed. No testimony was taken in the hearing but the time was taken up by argument with respect to the proposal for the amendment of the last paragraph of Rule 31, the Class "A" carriers opposing the amendment and modification on the ground that it would constitute an infringement upon the rights of Class "A" carriers in the transportation of the freight between fixed termini and over regular routes, and the Class "B" carriers contended that the changes contained in said amendment are necessary in order that Class "B" carriers may operate efficiently and continue to operate at a profit. The last paragraph of Rule No. 31, which is the paragraph now under consideration, as originally adopted by the Commission, is as follows, to wit:

"A Class 'B' permit shall not authorize the transportation of freight between points served by Class 'A' carrier except for the transportation of household goods or office furniture in use, oil field equipment and supplies, or such other commodities as may require special equipment or extraordinarily expeditious and rapid transportation, and any commodity

which such Class 'B' carrier may have held in storage in a warehouse owned or controlled by such carrier for as long as five days prior to the beginning of such transportation, and at a rate not less than that charged by Class 'A' carriers rendering service over said route; provided, that in the carrying or transportation of freight which the Class 'A' carrier is equipped to carry and which on account of the nature of the article or the extraordinary dispatch as authorized herein, the Class 'B' carrier shall charge for such service not less than one and one-half times the authorized rate of the Class 'A' carrier rendering service over such route."

It will be noted that the changes proposed in the suggested amendment broadened the character and classifications of commodities which the Class "B" carriers may be permitted to transport over lines and routes already served by Class "A" carriers. There is added to the classifications originally covered and authorized to be transported "stocks of goods, wares and merchandise, fixtures and equipment of an established business; material and supplies to locations, live stock, contents of carload shipments, including distribution to one or more consignees" in addition to these suggested changes, the requirement of the original paragraph that Class "B" carrier in transporting goods, wares, and merchandise, which the Class "B" carriers are equipped and able to handle and transport on schedule, shall charge a rate of not less than one and one-half times the rate charged by Class "A" carriers is to be eliminated.

There was also submitted in the

RE GENERAL RULES AND REGULATIONS FOR MOTOR CARRIERS

hearing a new rule providing for the payment of the annual tax imposed upon motor carriers under the statute, semi-annually in advance and providing for the substitution of motor vehicles of different capacity or kind to those covered by original certificates or permits issued by the Commission. There was no opposition to this suggested amendment.

Now on this 31st day of January, 1930, the Commission having under consideration the proposed amendment to the last paragraph of Rule 31 of Order No. 4831, and after having fully considered the contents of the original paragraph as well as the provisions contained in the suggested amendment, together with the arguments made by representatives of the two classes of carriers affected, and having under consideration the proposed new rule affecting the time of payment of the annual tax for motor carriers, is of the opinion and finds:

First: That the last paragraph of Rule 31, as contained in Order No. 4831, restricts the operation of Class "B" motor carriers to the transportation of certain classes of commodities over routes served by Class "A" carriers to such extent as to make it difficult of enforcement and to such extent as to restrict unnecessarily the operations of said Class "B" carriers under the conditions prescribed in the order.

Second: That, as proposed for the Class "B" carriers, there should be added to the commodities authorized in the original rule the following commodities, to-wit: "Removal of entire stock of goods or merchandise, fixtures and equipment of an established

business; building material, supplies to locations; contents of carload shipments including distribution to one or more consignees."

Third: That said last paragraph of Rule 31 should be amended so as to eliminate the charge of not less than one and one-half times the authorized rate as applied by Class "A" carriers.

Fourth: That the suggested amendment of the Class "B" carriers providing for transportation of live stock as one of the commodities should be denied for the reason that live stock by the terms of the act of the legislature apparently is exempt, and that the change in time which goods shall have been kept in storage in warehouses owned and controlled by Class "B" carriers, from five days to one day, as a condition precedent to transportation over routes served by Class "A" carriers, should be denied.

Fifth: That the new rule providing for the semi-annual payment of the annual tax imposed on motor vehicles under House Bill No. 19, should be provided for and should be added as an additional rule to be known as Rule No. 32½.

It is therefore the *order* of the Commission, premises considered, that the last paragraph of Rule No. 31 of Order No. 4831 be and the same is hereby amended to read as follows, to-wit:

A Class "B" permit shall not authorize the transportation of freight between points served by Class "A" carriers except for the transportation of household goods; office furniture in use; removal of entire stocks of

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goods, wares, and merchandise, fixtures and equipment of an established business; building materials and supplies to locations; contents of carload shipments including distribution to one or more consignees; oil field equipment and supplies; and such other commodities as may require special equipment not supplied by the Class "A" carrier or which may require extraordinarily expeditious and rapid transportation; and any commodity which such Class "B" carrier may have held in storage in a warehouse owned or controlled by such carrier for at least five days prior to the beginning of such transportation, and at a rate not less than that charged by Class "A" carriers rendering service over said route.

It is the further order of the Commission, premises considered, that a new rule to be known as Rule No. 32½ be and the same is hereby

adopted and promulgated as follows, to-wit:

Rule No. 32½: The annual tax imposed upon motor vehicles under the terms and provisions of House Bill No. 19 shall be paid in advance but may be paid semi-annually in advance, provided that operators may during any semi-annual period for which such tax may be due, and upon payment of the tax for the semi-annual period, upon the vehicle in use substitute over vehicles of different capacity from those authorized under their respective certificates or permits, but in such case such operator shall file proof of such substitution with the Corporation Commission, giving engine number, name, and capacity of such substituted vehicle as a condition precedent to such substitution.

This order to be in full force from and after its promulgation and publication as required by law.

MARYLAND PUBLIC SERVICE COMMISSION

Re Tidewater Toll Properties, Incorporated

[Case No. 3050, Order No. 15552.]

Security issues — Improper financing — Conditions — Toll bridge.

An application of a company, proposing to build and operate a toll bridge over a navigable stream, to issue securities was denied without prejudice to the right of the company to file a later application upon the fulfillment of conditions specified by the Commission, where the financial structure proposed did not afford sufficient protection and the right of corporate control to investors, and where a franchise to construct the bridge had not yet been obtained from the Federal Government.

[April 8, 1930.]

APPPLICATION of a toll bridge company for authority to issue securities; denied without prejudice to the filing of a subsequent application upon the fulfillment of conditions specified herein.

RE TIDEWATER TOLL PROPERTIES, INC.

APPEARANCE: Eugene Frederick, for the applicant.

By the **COMMISSION:** The Tidewater Toll Properties, Incorporated, is a Maryland corporation formed for the purpose, among other things, of building toll bridges across streams in Maryland. It acquired a congressional franchise, granted to Mr. V. Calvin Trice of Cambridge, Maryland, passed by Congress in accordance with the General Bridge Act of 1906, for a bridge across the Choptank river, at Cambridge, Maryland. This franchise expired by limitation because no work was done within a year after the passage of the act. A bill reviving the franchise, but in the name of the Tidewater Toll Properties, Incorporated, was introduced in the United States Senate by Senator Tydings, and passed. It has not yet passed the House of Representatives. A bill introduced by Senator Tydings granting a franchise to the same corporation for a bridge across the Patuxent river was also passed by the Senate, but has not yet passed the House of Representatives. The company also claims a somewhat indefinite interest in the toll bridge across Bear creek near Baltimore, built by the McClintick-Marshall Company under a franchise granted by the legislature of Maryland and authorized to be exercised by this Commission.

Tidewater Toll Properties, Incorporated, seeks the approval of this Commission of a plan of financing for the Choptank river bridge; no approval by this Commission of a congressional franchise being necessary. The authorized capital of the Company is 100,000 shares of 7½ per cent P.U.R.1930C.

cumulative participating preferred stock of the par value of \$10 a share, 33,333 shares of Class A common stock of no par value, and 166,667 shares of Class B common stock of a par value of 1 cent a share. Class A and Class B common stock have equal voting rights, and under certain conditions, such as failure to pay dividends upon it, the preferred stock has voting rights.

The company plans to sell to the Security Sales Corporation of Maryland 60,000 shares of its preferred stock and 20,000 shares of its Class A common stock for \$600,000 which is the total par value of the preferred planned to be sold. In addition the Security Sales Corporation is to receive 2,500 shares of Class B common (par value 1 per cent) for each \$100,000 paid to the Tidewater Toll Properties, Incorporated, until \$500,000 shall have been paid, and after that it will receive 2,500 shares of Class B common stock for each additional \$50,000 paid to the Toll Company.

The Security Sales Corporation plans to sell the stock to the public in units of three shares of preferred and one share of Class A common stock at a price of \$40 for each unit. Thus for selling each unit, the Security Sales Corporation receives \$10. If it should sell the 20,000 units necessary to produce the \$600,000 said to be required for the building of the bridge, it would, for its services, receive \$200,000, and in addition it would receive 17,500 shares of the Class B common stock.

It is to be noted that the Security Sales Corporation does not agree to underwrite the stock and it is not ob-

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ligated to buy a single share until it has sold such share to the public. As to what would happen if part of the stock should be sold, but not enough of it to insure the building of the bridge, the record is indefinite.

What the purchasers would be able to get back is uncertain but it is certain they would not get back the 25 per cent which the Security Sales Corporation was paid for selling the stock.

The record indicates that Mr. Trice is to receive an indefinite amount of the Class B common stock for whatever rights and franchises he turned over to the Tidewater Toll Properties, Incorporated.

The case is not properly before the Commission because the Tidewater Toll Properties, Incorporated, is without authority to build the proposed bridge across the Choptank. The Commission heard the case on March 10, 1930. It had no official knowledge until the hearing was under way that the House of Representatives had not passed, nor the President signed, the Tydings Bill (§ 3421), granting authority for the construction of the bridge. The Commission, however, permitted counsel and witnesses for the applicant to explain their proposition, and submit such documents as they desired, with the view that this might facilitate subsequent proceedings if their franchise should be secured.

As a matter of fairness, the Commission feels that the applicant ought to be advised of the Commission's views of the project as submitted, in order that it may modify its plans so as to meet Commission approval if they are submitted at a later date.

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In the first place, the Commission feels that it would be unwise to approve such a plan of financing as has been submitted. It appears to be unsound and it fails to afford sufficient protection to those who would invest their money in the enterprise. The spread between what the investors would pay, and what the company would receive for the stock, 25 per cent, is far too great. If, as counsel for the applicant explained, it cannot be done in any other way, then it seems to the Commission that it had better not be done at all. In the plan as outlined no one seems to take any risk except those who are to be asked to buy these units of stock at \$40 per unit, and after they have bought their stock and taken their risk, they are to have but slight voice in the management and control of the enterprise. Even if the full amount required is subscribed, 20,000 units, for which the purchasers will pay \$800,000, but of which the company will only receive \$600,000, the persons who put up the \$800,000 will have only 20,000 votes under ordinary conditions, while the Security Sales Corporation alone, which is to receive \$200,000 for selling them the stock, will have 17,500 votes.

The stock which this corporation will hold will, as heretofore stated, be additional compensation for marketing the stock in units and will yield nothing to the treasury of the bridge company. If Mr. Trice should be given 3,000 shares of the Class B stock, the par value of which would be only \$30, for his intangible contributions to the assets of the company, he, with the Security Sales Corporation, could control the company

RE TIDEWATER TOLL PROPERTIES, INC.

without the actual investment of a single dollar. What would be done with the remaining shares of Class B stock is not disclosed. The total par value of the entire issue of 166,667 shares is only \$1,666.67. Its purpose appears to be purely for control, and those who actually put up the money for the building of the bridge appear to get none of it.

If and when the matter is again brought before the Commission, the Commission will require the submission of a plan of financing regarded by it to be reasonable and sound, and which will afford ample protection and the right of control to those who invest their money in the enterprise. It will also require:

Completed plans for the proposed bridge, showing its exact location, with detailed and careful estimates of its cost, made by competent persons.

Approval by the United States War Department of the plans for the bridge proper and of the draw span.

Assurance from the Commissioners of Talbot and Dorchester counties, and from the state roads commission, that the proposed bridge will be connected with the highways of the counties and/or the city of Cambridge; or in the event that such assurances are not secured, that the Tidewater Toll Properties, Incorporated, or some other appropriate agency has the authority to and will connect the bridge

by proper roadways and approaches with the existing public highways. It is obvious that unless the proposed bridge is so connected it will not "promote interstate commerce, improve the postal service, and provide for military and other purposes," which are the reasons given in the act for the grant of a congressional franchise. Nothing in the application now before the Commission indicates how such connections with existing highways are to be made.

The application of Tidewater Toll Properties, Incorporated, as now before the Commission, will be dismissed for the reasons herein above stated.

ORDER

This case having been duly heard and submitted and full investigation of the matters and things having been had and the Commission, on the date hereof, having rendered and filed an opinion containing its findings of fact and conclusions thereon, which said opinion is hereby referred to and made a part hereof.

It is, therefore, this 8th day of April, in the year Nineteen Hundred and Thirty, by the Public Service Commission of Maryland,

Ordered: That the application of Tidewater Toll Properties, Incorporated, filed herein be, and the same is hereby, dismissed.

OHIO PUBLIC UTILITIES COMMISSION

OHIO PUBLIC UTILITIES COMMISSION

Columbus Gas & Fuel Company

v.

City of Columbus

[No. 5935.]

Rates — Commission jurisdiction — Emergency rates.

The Commission denied for lack of jurisdiction an application of a gas utility for an emergency rate, pending a judicial determination of litigation concerning the validity of a rate ordinance.

[March 27, 1930.]

APPPLICATION of a natural gas utility for an emergency rate; denied.

By the COMMISSION: This matter comes on for hearing before the Public Utilities Commission, on the application of the Columbus Gas & Fuel Company for an emergency rate, under the power given the Commission in § 614-32 which section reads as follows:

"Sec. 614-32. POWER TO AMEND, ALTER, OR SUSPEND SCHEDULE OF RATES.—The Commission shall have power, when deemed by it necessary to prevent injury to the business or interests of the public or any public utility of this state in case of any emergency to be judged by the Commission, to temporarily alter, amend, or with the consent of the public utility concerned suspend any existing rates, schedules, or order relating to or affecting any public utility or part of any public utility in this state. Such rates so made by the Commission shall apply to one or more of the public utilities in this state or to any portion thereof as may be directed by

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the Commission, and shall take effect at such time and remain in force for such length of time as may be prescribed by the Commission."

The company contends that if the Commission does not have power under the above section to so provide for an emergency rate, that it has under § 487 of the General Code which reads as follows:

"Sec. 487. THE PUBLIC UTILITIES COMMISSION OF OHIO; APPOINTMENT, TERM, VACANCIES.—There shall be and there is hereby created a Public Utilities Commission of Ohio and by that name the Commission may sue and be sued. The Public Utilities Commission shall consist of three members, who shall be appointed by the governor with the advice and consent of the senate, and shall possess the powers and duties herein specified as well as all powers necessary and proper to carry out the purposes of this chapter."

The Commission is of the opinion

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that the above general grant of power is not sufficient to authorize the Commission to fix an emergency, temporary rate for any utility. The powers of the Public Utilities Commission are those only, which are conferred by statute.

Ordinance No. 645-29 now under consideration by the Commission on appeal by the company, was enacted under and by virtue of the power granted in §§ 614-44-45-46.

Section 614-32 providing for an emergency rate, being the section under which the company applies to the Commission, is a part of the same act wherein we find § 614-47, which reads as follows:

"Sec. 614-47. WHEN ACT NOT APPLICABLE.—This act shall not apply to any rate, fare, or regulation now or hereafter prescribed by any municipal corporation granting a right, permission, authority, or franchise, to use its streets, alleys, avenues, or public places, for street railway or street railroad purposes, or to any prices so fixed under §§ 3644, 3982, and 3983 of the General Code, except as provided in §§ 46, 47, and 48 of this act."

Section 614-47, therefore, expressly says that § 614-32, the emergency section shall not apply to any prices fixed under § 3982 of the General Code of Ohio, which reads as follows:

"Sec. 3982. COUNCIL MAY REGULATE PRICE OF ELECTRIC LIGHT, GAS, AND WATER.—The council of a municipality in which electric lighting companies, natural or artificial gas companies, gas light or coke companies, or companies for supplying water for public or private consumption

are established, or into which their wires, mains, or pipes are conducted, may regulate from time to time the price which such companies may charge for electric light, or for gas for lighting or fuel purposes, or for water for public or private consumption, furnished by such companies to the citizens, public grounds, and buildings, streets, lanes, alleys, avenues, wharves, and landing places, or for fire protection. Such companies shall in no event charge more for electric light, natural or artificial gas, or water, furnished to such corporation or individuals, than the price specified by ordinance of council. The council may regulate and fix the price which such companies shall charge for the rent of their meters, and such ordinance may provide that such price shall include the use of meters to be furnished by such companies, and in such case meters shall be furnished and kept in repair by such companies and no separate charge shall be made, either directly or indirectly, for the use or repair of them," except as provided in §§ 614-44-45-46. Those sections, being the authority whereby the company brings its case on appeal before the Commission, in the opinion of the Commission are exclusive in the jurisdiction which they grant to the Commission to in any way fix or determine the rate to be charged for the service rendered by the utility.

It is the opinion of the Commission, therefore, being limited as to its powers to those expressly granted by statute, that the only section permitting the Commission to fix a temporary or emergency rate is § 614-32. Since that section is expressly not applicable

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to an action brought under the provisions of §§ 614-44-45-46, as this one is, the Commission is without jurisdiction to alter, amend, or suspend the existing rate schedules. The Commission can, under §§ 614-44-45-46 after hearing and with due regard to the value of the property used and useful, fix and determine the just and reasonable rate, price, charge, toll, or

rental to be charged. The company can, under said sections, elect to charge the rate in effect immediately prior to the rate fixed by ordinance. Beyond this, the Commission is without jurisdiction in the premises.

An order will issue, therefore, dismissing the application of the Columbus Gas & Fuel Company for a temporary or emergency rate.

NORTH CAROLINA CORPORATION COMMISSION

Fremont Telephone Company

v.

Carolina Telephone & Telegraph Company

Monopoly and competition — Construction of toll lines — Telephone companies.

A telephone company should not be authorized to construct a toll line between two communities for operation in competition with the line of another company already constructed, where there exists a valid agreement between the companies under which the former has agreed to use the facilities of the latter upon terms set forth, and where the existing service is not shown to be inadequate.

[March 24, 1930.]

PETITION by a telephone company for authority to construct and operate a toll line; dismissed.

By the COMMISSION: Petition was filed in this case March 13, 1928; evidence heard March 20, 1929; order entered November 15, 1929, granting the petition; exceptions to order filed by respondent on January 2, 1930, and hearing had on said exceptions February 12, 1930, at which hearing the entire case was reviewed by the Commission and all the matters in controversy and the contentions of both petitioner and respondent were

again presented by counsel both orally and by briefs.

It will be recalled that the petitioner in this case seeks to have the Commission authorize it to construct a telephone line along the highway from Fremont to Wilson and order the respondent to allow a physical connection of the telephone system of petitioner with that of the respondent at Wilson in order that the petitioner may route its toll messages to Wilson

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and beyond over its own toll line, which it asks authority to construct to Wilson.

The petitioner contends that the toll line now in operation between Fremont and Wilson and other points is not adequate to meet the needs of the public using the Fremont exchange.

The respondent denies that the toll facilities are inadequate and further contends that it has had for some time an additional circuit through the town of Fremont which the petitioner has refused to permit respondent to connect to the Fremont switchboard, and further contends that when said additional circuit is connected there will be a surplus of service.

From all the evidence adduced at the hearings and the admissions of counsel, and after a very careful and full consideration of the testimony, the arguments of counsel and the briefs filed by both sides, the Commission finds the following facts:

That there is now a valid contract subsisting between petitioner and respondent, entered into at the request of the petitioner, wherein the petitioner has agreed to use the toll line of the respondent from Fremont to Wilson upon terms set out in said contract; that the respondent has performed and is performing its part under said contract; that the respondent

has one toll line now in use and has completed another circuit which it stands ready to connect with the switchboard of the petitioner at Fremont whenever the petitioner will permit it to do so, which, when connected, will afford adequate and ample long distance telephone facilities for the town of Fremont for some time to come. The Commission further finds that if the petitioner were allowed to construct the proposed line there would then be a duplication of service between Fremont and Wilson which the Commission finds is not needed and which would in effect tend to render nugatory the contract aforesaid.

Several questions of law are raised by the exceptions but the Commission deems it unnecessary and does not pass on said questions of law for the reason that it is of the opinion that the present service between Fremont and Wilson is adequate for the public needs and that the Commission certainly would not be justified in impairing the obligation of a contract when public necessity does not demand it. It is, therefore,

Ordered, that the order heretofore made in this case be and the same is hereby revoked; that the exceptions relevant to the above findings are allowed, and that the petition be dismissed.

NEVADA PUBLIC SERVICE COMMISSION

NEVADA PUBLIC SERVICE COMMISSION

Board of County Commissioners of
Esmeralda County

v.

Goldfield Consolidated Water Company

[Case No. 989.]

Depreciation — Limitations — Earning capacity.

1. A depreciation allowance should be limited to the ability of the utility to earn operating revenues from which to deduct it, or to the extent that the use of the property justifies renewals based on the business available, and it is also limited to the extent that renewals are made out of current operating expenses, p. 261.

Depreciation — Accumulated reserve — Amortization of investment.

2. The accumulation of hypothetical depreciation reserves and their dispersing either in dividends or in the construction of new property is not justified, nor is there any justification for amortizing the original investment of a utility under any plan or device, p. 261.

Discrimination — Free service to municipality — Fire protection.

3. Free service for fire protection to a municipality by a water utility is discriminatory, p. 265.

Rates — Contracts — Commission jurisdiction — Free service.

4. The Commission, in the exercise of its superior statutory jurisdiction over the rates of water utilities, directed a town board to pay a reasonable rate for fire protection service notwithstanding a claim by the municipality that it was entitled to free fire protection service by reason of a former contract between it and the utility, p. 265.

[March 22, 1930.]

COMPLAINT by a board of county commissioners acting as a town board in the matter of charges for fire protection to be paid to a water utility; municipality ordered to pay charges specified herein.

APPEARANCES: J. F. Shaughnessy, Chairman, for the Commission; For the Board of County Commissioners: J. A. Houlahan, District Attorney, R. T. Armstrong, Deputy Sheriff and Assessor, Mrs. Amy Rob-

erson, County Clerk and Treasurer, Oscar Olsen, formerly fireman, George E. McKenna, formerly County Commissioner, J. P. Murphy, formerly Fire Chief, Harold M. Childers, formerly Fire Chief, E. S. Giles,

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County Surveyor, Frank E. O'Neill, County Commissioner, Charles W. Brandon, County Commissioner, George Connolly, Fire Chief, and Frank L. Beard, Real Estate and Insurance Agent; Walter Rowson, Attorney, L. F. Detwiler, Superintendent, Francis D. Frost, President and General Manager, for Goldfield Consolidated Water Company.

SHAUGHNESSY, Chairman: This case puts in issue the charges for fire protection at the rate of \$10 per hydrant per month covering 20 hydrants, or a total of \$200 per month, which the Goldfield Consolidated Water Company (hereinafter referred to as Company) charges for such service to the town of Goldfield (hereinafter referred to as Town). Goldfield is governed by the Esmeralda board of county commissioners, acting as a town board, and for whom J. A. Houlahan, the duly elected and acting district attorney of Esmeralda county, acts as counsel.

Mr. Houlahan, in connection with filing complaint before this Commission as to the reasonableness of the charges for fire protection, made an offer to the Company, of a rate of \$100 per month to cover such service for the future, in lieu of the present rate of \$200 per month, and which is being charged pursuant to the Commission's order of August 9, 1923. The proposal in question was rejected by the Company. The case went to hearing before the Commission on December 17 and 18, 1929, at Goldfield. Mr. Houlahan made reference to the provision carried in the contract between the Town and the Company in 1907, which was negotiated

for a period of ten years, which provided that ample supply of water and pressure on the mains, as well as 44 hydrants, would be maintained for fire protection, at the rate of \$8 per hydrant per month, or a total of \$352 per month. The contract also provided for free service to county and town buildings up to use of 30,000 gallons per month, and for all in excess thereof at the rate of \$3 per one thousand gallons, or at half the average rate for domestic and commercial services; and it was further provided that at the expiration of the 10-year period, free fire protection service was to be rendered to the Town by the Company.

It should be here noted that record of testimony taken at the hearing held in Goldfield December 11 and 12, 1924, and upon which the Commission's order of January 3, 1925 (anno.) P.U.R.1925E, 763, was made, has by reference been made testimony of record in this proceeding, and that the 1907 contract referred to above is a part of that record and is, therefore, available for consideration and action.

In this proceeding it is pleaded that inasmuch as after the expiration of the 10-year period the Town was to have free fire protection service from the Company, and the contract having expired many years ago, the Town could not be required to pay for fire protection for the future. That in so far as the Town desired to do so, there was not, nor could there be, any objection to the paying for such service for the support of the facility in question, which becomes a charge on all property through taxation, instead of placing the burden on the consum-

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ers at large by the payment of higher rates.

In support of the plea that the Town was not obligated to pay for fire protection for the future, reference was given to § 15 of the Public Service Commission Act of 1911, and as amended in 1919, which carries a provision that contracts in existence March 23, 1911, shall not be suspended, rescinded, or invalidated.

Reference was also given to a special act relating to the matter of fire protection, 1913 Statutes, Chapter 255, Page 387, approved March 26, 1913, which requires water companies to furnish cities, towns, villages, or hamlets with a reasonably adequate supply of water, at reasonable pressure for fire protection, at reasonable rates, to be fixed by the Public Service Commission, regardless of any conditions to the contrary in any charter, franchise, or permit, or whatsoever character, granted by any county, city, town, village, or hamlet, within the state of Nevada, or any charter, franchise, or permit granted by any authority outside the state of Nevada.

This special act is, in our view, controlling, and has been accepted for a number of years past by the Town, which has paid bills for fire protection pursuant to rates prescribed by the orders of this Commission. The question of fire protection is the one especially in issue in this proceeding. Reference is given to previous decisions, under which the benefits of the Public Service Commission Act, and the Special Act of 1913, were taken by the Town. See *Donovan & Frisbie v. Goldfield Consol. Water Co.* Case U-89, decided February 25, 1916, P.U.R.1916D, 419; *Re Application for Increased Rates*, I. & S. 3, decided August 1, 1918; *Re Application for Increased Rates*, decided August 9, 1923; *Goldfield Case*, decided January 3, 1925, *supra*. In the Commission's opinion and order in the latter case, which by reference is in evidence in this proceeding, a historical abstract of the benefits accorded to the Town under the aforesaid acts is set forth in comparative detail.

In the case of *Donovan & Frisbie, supra*, decided February 25, 1916, and effective April 1, 1916, the rates of the water company were reduced from a maximum of \$7.50 per one thousand gallons for the first 3,000 gallons; from \$5 for the next 5,000 gallons; from \$4 for the next 10,000; and from \$3.50 for the next 20,000 gallons to 50,000 gallons; to a flat rate of \$3 per one thousand gallons for residence and commercial services. In other words, the sales within the above quantities to residences and commercial consumers averaged \$6 per one thousand gallons, and this, as above noted was reduced to \$3 per one thousand gallons. Minimum monthly charges were fixed as follows:

\$2.00 for domestic service, without sewer.
\$2.50 for domestic service, with sewer.
\$3.00 for commercial service.
Within these charges, graduated rates and water allowances were filed and applied.

Rates for sewer service were reduced from an average of \$2.80 per month to \$2 per month for domestic service and from an average of \$7 per month to \$5 per month for commercial service.

In the 1918 Case, I. & S. 3, *supra*, the Commission, by its order, suspended the establishment of a \$6 per thousand gallon rate, which was filed

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to take care of increased war expenses. In lieu thereof, the Commission by its order, effective September 1, 1918, allowed \$4 and \$3.50 rates, in lieu of the \$3 rates for the first and second 5,000 gallons of use. All other rates were allowed to remain as fixed in the 1916 order, *supra*.

Following the disastrous fire of July, 1923, which destroyed much of the company's business, further increased rates were considered. Pursuant to the recommendation of a citizens committee, and to the approval of the Commission, effective August 9, 1923, there was established for fire protection service, charges of \$10 per hydrant per month to cover 35 hydrants, and provision for a rate of \$4 per 1,000 gallons for service to the county buildings and schoolhouses at Goldfield. These payments for service to the county buildings and schoolhouses have continued uninterruptedly to date. As to the hydrant rentals for fire protection, on September 30, 1924, following another disastrous fire in Goldfield, which practically wiped out all of the remaining business section of the Town, the board of county commissioners refused to make further payment for fire protection.

In order to provide for necessary operating expenses and taxes, with which to insure the continuance of water service for fire protection to the town of Goldfield, and the consumers, for the future, the Company on February 28, 1924, filed an application with this Commission for a 50 per cent increase in rates, and in minimum monthly charges for water service. On December 11 and 12, 1924, the

matter was fully heard at Goldfield and an order was made in alternative form, requiring the Town to either provide for the payment of fire protection service at the rate of \$10 per hydrant per month, to cover 20 hydrants, or a total of \$200 per month, instead of the aforesaid 35 hydrants at \$350 per month, and a nominal increase in minimum monthly charges, with a substantial increase in water allowance, or in lieu thereof that certain fixed increased water rates and minimum monthly charges be made to cover domestic, commercial, and industrial services.

In this behalf it is to be noted in passing that the Town accepted \$200 per month rate for fire protection, in lieu of the said general rate increase, hence we find the Town accepting the orders of the Commission to pay for fire protection, following the 1923 fire and again following the 1924 fire, in order to keep the water system in operation, and to avoid the payment of heavy increased rates and minimum monthly charges, by the consumers at large. In this behalf the minutes of the board of county commissioners, acting as a town board for and on behalf of Goldfield, on August 27, 1923, showed that the board approved a charge of \$10 per hydrant per month to cover fire protection service, based on 35 hydrants as per the order of the Commission, effective August 9, 1923. Likewise that the order of the Commission prescribing rates to cover service to the county buildings of Esmeralda county and school buildings at Goldfield, received the approval of the Board, and to date the rates fixed as of January 3, 1925 (anno.) P.U.R.

1925E, 763, have been applied, and

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bills rendered thereunder have been paid.

Moreover, at the hearing in this proceeding it was brought out in testimony that the county commissioners following the aforesaid 1925 order, *supra*, did not designate the 20 hydrants in question. On the contrary, the Town has continued to use the 35 hydrants provided for in the 1923 order, but that payment has been made to cover only 20 hydrants—the county commissioners taking the position that said order did not require the designation of 20 hydrants under the \$200 per month payment—hence the average rate per hydrant paid for fire protection service by the Town has been at the rate of \$5.75 per hydrant, per month, since the order of January 3, 1925, *supra*. It is of record that there is a total of 41 hydrants at present attached to the distribution system in Goldfield; that the testimony as to the pressure is conflicting, from which it is estimated that it varies from 20 to 50 pounds; that there is an adequate reserve supply of water available in the tanks at Goldfield and an adequate volume of water in the mains; that, as indicated in the previous case, the distribution mains will not stand a pressure in excess of 60 or 65 pounds without danger of breaking, with consequent disaster during a bad fire; that based on the company's office meter the pressure on the distribution system ranges from 40 to 65 pounds, from which it is estimated that the average is 50 pounds; that the company always increases the volume of water when the fire signal is given and hose is in action. This is controlled by a valve at a fire tank of large capacity, which is held in reserve for fire protection

service, and is given the personal attention of the superintendent, or a reliable assistant, when he is absent. That with the water in storage at Goldfield, a pressure ranging from 85 to 95 pounds could be secured, but this would involve renewing about two-thirds of the distribution mains at a cost of \$30,000 and the cost of laterals would increase this estimate.

That testimony of a real estate agent of Goldfield, indicated by reference to book No. 4 of the Board of Underwriters of San Francisco, that the insurance rate in Goldfield was about the same as that in Tonopah. That the fire truck of the Town should be equipped with a pressure pump of sufficient capacity to feed two lines of hose with a pressure of 80 pounds; and while this was recommended by a committee of citizens of the Town, following the 1925 order, *supra*; and while the committee reported that such pump could be purchased and installed for \$1,200 with a capacity sufficient to feed two lines of hose with a water pressure ranging from 60 to 80 pounds, and that while the supply of water available for fire purposes is adequate, no action in this direction has been taken by the Town.

The superintendent of the water company testified that the Company has always given an adequate volume of water at fires, that it has, as aforesaid, maintained 35 hydrants since 1924 instead of 20 hydrants, for which compensation is received; that the town board has interpreted the Commission's order to mean that the Company should maintain 35 hydrants while the board pays rental for only 20 hydrants; that Booster pump for fire truck has not been purchased

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as contemplated by the Commission's order of January 9, 1925, *supra*; that the minimum monthly charges range from \$2.25 to \$3 for domestic and commercial services, and that the majority of the consumers stay within these charges.

The president of the Company testified that increased revenues from Bradshaw Incorporated, an important gold milling operation at Goldfield, during the past two years has enabled the Company to make substantial renewals and repairs to the water system, including the distribution mains, within the Town, and which has enabled the Company to continue the operation of its water plant; that during the eight months of each year, when Bradshaw Incorporated is operating at Goldfield, its mill consumes from two million to three million gallons of water per month; that it enjoys a graduated rate beginning at 65 cents per one thousand gallons, or the same as is paid by the railroad; and that its bills run from \$1,200 to \$1,500 per month; that there is \$226,000 in 6 per cent bonds outstanding against the Company, on which it has been unable, and is unable, to make retirements or pay interest; that the reasonable value of the Goldfield Water Company is \$75,000; in the 1916 Case, P.U.R. 1916D, 419, the original cost of this property was shown to be in excess of \$400,000; that upon the case being carried into court (Goldfield Water Case (1916) 236 Fed. 979, 983, P.U.R.1917A, 685) the Commission showed that, because of heavy deflation in Town population and values, also excess plant capacity, the reasonable value of the property was \$151,000, which was sustained by the court.

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The president contended that an 8 per cent return on the reasonable value of the property (\$75,000), or \$6,000 per annum, would be a fair return; that its net earnings (without allowance for depreciation) have varied from \$866 to approximately \$5,500 during the past seven years, or an average of about \$2,800 per annum. The estimated net earning for the past three years averaged \$4,400 per annum, whereas the net earnings for the year 1929, based on eleven months of said year, is estimated to be \$5,546. From the above it will be noted that the returns made by this Company have been rather meager, and that they are not more at the present time than should be reasonably earned for the purpose of adequately maintaining the plant and rendering efficient service, further that the prospects are poor for retirement of bonded indebtedness, unless there is a rehabilitation of the mining industry at Goldfield, and in which event a substantial outlay of new capital will be necessary on the part of the water company. The Company had paid only one dividend since 1916, and has made retirements of notes outstanding in the amount of \$10,400, leaving approximately \$6,000 still outstanding on these notes, which were incurred in 1918 and 1919.

[1, 2] Depreciation, or the cost of operating property retirements to insure the good operating condition of the plant, is a deduction from operating revenues which has become adjudicated law. Its application is, however, as in the instant case, limited to the ability of the Company to earn same, or to the extent that the use of the property justifies renewals based on the business available; and it is also

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limited to the extent that renewals are made out of current operating expenses. In so far as the property is maintained in a high degree of operating efficiency no allowance for depreciation is warranted. Otherwise, we find ourselves endeavoring to anticipate something that does not materialize under good maintenance—the net result of which is to amortize the investment over and over again in permanent life communities. In other words, we will find ourselves not only paying a fair return on the capital devoted to the public service, but also making the capital investment as well. Those entering the business should at least make the original investment—which, under the above formula, they never would. It is not, however, unfair to pay the actual cost of renewals, either through operating expenses, or from a separate depreciation fund carefully policed, or by amortization of this cost over a period of future years—preferably the latter, which is an above board honest plan that would not admit of concealment. In any event, there is no justification for permitting the accumulation of hypothetical depreciation reserves, and thereafter dispersing them either in dividends or in the construction of new property, nor is there any justification for the amortizing of the original investment under any plan or device.

The latter point was raised in the Goldfield Consolidated Water Case, 236 Fed. 979, 984, P.U.R.1917A, 685, 692, decided October 9, 1916, wherein the court said:

"Speculation as to the probable life of Goldfield will not lead to any conclusion substantial enough to be controlling. Unquestionably the present

life of the mines is uncertain. This is a hazard which every investor, not only in Goldfield, but in any other mining camp, knows and appreciates. This risk is reflected in rates of interest and in prices generally. In my judgment it should be taken care of in the rates."

In the Ely Light & Power Case, decided August 8, 1913 (cited in P.U.R.1924A, 853) this Commission reviewed the same question in the following language:

"In the judgment of the Commission too much weight has been given to the claim that mining camps are short-lived for the purpose of justifying what might appear to be excessive rates. When a public service corporation engages in such a locality, it takes no greater risk than most business men in the same place. It is sometimes said that there is a difference between a public service corporation and parties engaged in other lines of business, in this: That the public service corporation is subject to regulation while other callings are not.

. . . While it is true that a merchant in a mining camp is not subject to regulation, it is equally true that as a rule he is subject to competition. On the other hand, while the public service corporation is subject to regulation, it is free from competition. In other words, public service corporations are generally monopolies having full control of the business in their particular lines. . . . In this particular case, for example, if the city of Ely should have greatly diminished in size and general prosperity, while it would affect the business of the public service corporation, the business of the people would be affected in much

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the same way and probably in about the same ratio."

Again in the Tonopah Sewer & Drainage Case (Nev.) P.U.R.1924A, 837, 852, the Commission had under consideration the question of the depreciation allowance based on the estimated life expectancy of Tonopah, and where, aside from maintenance charged to operating expenses, the Commission found there was practically no physical depreciation in the sewer plant. Real estate agents estimated a life of ten years, whereas the Company was contending for a life ranging from three to five years. Among other things, the Commission said:

"Here we have the company supporting its contention for a high rate of return on an estimated reproduction cost value of \$80,000 plus an annual redemption allowance sufficient to redeem said reproduction cost in twenty years, using a straight-line basis of redemption, but without, at the same time, applying the commercial base as the measure of value which is used in the transfer or sale of town property in Tonopah. This is manifestly inconsistent. Moreover,

to grant this request is the equivalent of requiring the community of Tonopah to make the investment in the sewer company's property. and at the same time to pay to the company a fair return on the value of the property which the community will ultimately have paid for, while the title thereto or the ownership remains in the company. This, in our view, is beyond the pale of reasonableness."

The Company is maintaining, out of operating expenses, over 30 miles of supply mains, from springs in the mountains; that it must pump this water one mile over a summit in reaching Goldfield; that it maintains 13 miles of distributing mains, and 8 miles of sewer mains in Goldfield. Considering these operations and the importance of water service to the Town and its mining industry, we are of the opinion that the Company can not do any better than it is doing.

There is available from the Company's annual reports to the Commission the following statement of earnings, expenses, and sales from water, including earnings from the sewer department; also the 1928 capitalization and interest accrued:

	1923	1924	1925	1926	1927	1928
Gross earnings	\$24,025	\$23,314	\$22,337	\$22,335	\$28,356	\$33,442.25
Operating expenses	19,619	20,751	18,818	17,674	23,797	27,626
Taxes	1,460	1,577	1,768	1,795	1,718	1,793
Net earnings	2,945	985	1,750	866	2,839	4,022

The gross earnings for the year 1928 were distributed as follows:

Meter sales	\$26,852.75
Municipal hydrants	2,400.00
Miscellaneous municipal sales	267.20
Sewer revenue	3,922.30

CAPITALIZATION

	Authorized	Issued
Common stock	\$1,000,000	\$998,996
	Face Value Authorized	Face Value Outstanding
First mortgage bonds	\$300,000	\$226,000
Interest at rate of 6% accrued for year 1928		\$13,560
Paid		None
Dividends paid		None

NEVADA PUBLIC SERVICE COMMISSION

Pursuant to the request of counsel of the Town of Goldfield, and in compliance with the order of the Commission, the president furnished the following statement of the Company for the 11 months of 1928 and 1929, respectively, showing in comparative detail the operating revenues and expenses:

GOLDFIELD CONSOLIDATED WATER COMPANY Comparative Operating Statement January 1st—November 30th

		11 Months 1929	11 Months 1928
<i>Operating revenues</i>			
601-	Metered sales to general consumers	\$22,805.56	\$25,054.30
605-	Municipal hydrants	2,200.00	2,200.00
606-	Municipal sales	245.10	247.50
614-	Sewer revenue	3,606.35	3,582.95
Total operating revenue		\$28,857.01	\$31,084.75
<i>Operating expenses</i>			
701-2	Operating labor	35.00	80.02
704-	Water purchased for resale	37.11	37.08
Total source of supply expense		72.11	117.10
723-2	Maintenance electric pump equipment	49.50	129.40
724-	Power purchased	8.25	31.50
Total electric pump expense		57.75	160.90
Superintendence		1,100.00	1,100.00
731-3	Pumping labor	3,191.50	3,052.50
732-1	Fuel oil	3,016.01	2,435.15
732-4	Miscellaneous supplies and expense	90.45	88.00
733-3	Maintenance of equipment	840.54	1,217.35
Total oil pump expense		8,238.50	7,893.00
Superintendence		1,100.00	1,100.00
751-1	Meter expense	334.50	496.96
753-2	Maintenance transmission mains	4,354.32	5,280.98
753-4	Maintenance distribution mains	4,262.47	4,862.74
Total transmission and distribution expense...		\$10,051.29	\$11,740.68
761-2	Meter reading	176.50	176.50
761-4	Collecting	550.00	550.00
761-6	Miscellaneous commercial expense	96.03	113.84
Total commercial expense		882.53	840.34
781-12	General office salaries	825.00	825.00
781-21	General office supplies and expense	249.36	270.20
781-24	Law expense	1,200.00
781-25	Insurance	335.00	330.44
781-28	Miscellaneous general expense	149.25
781-28-A	Sewer maintenance	1,276.85	1,471.01
Total general expense		2,835.46	4,096.65
Grand total operating expense		22,077.64	24,848.67
404-	Taxes	1,694.83	1,793.12
Total revenue deduction		\$23,772.47	\$26,641.79
Operating income—exclusive of interest and depreciation		5,084.54	4,442.96
Bond interest		12,430.00	12,430.00
Deficit—exclusive of depreciation		\$7,345.46	\$7,987.04

BOARD OF COUNTY COMRS. v. GOLDFIELD CONSOL. WATER CO.

Conclusion

[3] Regulation does not deal solely with the amount of the charge to the individual consumer, nor to any class of consumers. Rates for service to subdivisions of government may be found to be unjustly discriminatory or preferential, and, therefore, come within the requirements of the Special Act, 1913 Statutes, Chap. 255, Page 387, approved March 26, 1913, and, therefore, subject to regulation. The rendering of free service for fire protection to Goldfield would be clearly discriminatory and unjustly preferential, because it would burden the consumers at large by requiring the payment of higher rates than at present for water service.

Legislatures, courts, and Commissions have recognized and adopted the principle that municipalities and other subdivisions of government should pay a rate commensurate with the general consumer's rate instead of a free rate, or an unduly preferential rate. The expenses of municipalities, or other subdivisions of government, are taken care of by general taxation equally distributed over all classes of property throughout the community, and, therefore, it is equitable and just to require the government to pay its fair share for service received, and thus lighten the burden on the small consumer least able to pay, while at one and the same time maintaining an indispensable necessity, such as the Goldfield Water System.

[4] The real question raised in this proceeding turns entirely upon the point as to whether the contract of 1907 is still alive or whether it has been abrogated by the exercise of the

state's police power, dealing with the matter of fire protection, as indicated in the Special Statute of 1913, *supra*, and pursuant to the previous orders of this Commission hereinbefore referred to.

That action taken in previous decisions did not amount to the impairment of the obligation of a contract, and will not so operate for the future, is quite fully discussed in the case of Tonopah Sewer & Drainage Co. v. Nye County (1927) 50 Nev. 173, P.U.R.1927C, 748, 750, 254 Pac. 796, wherein the court, among other things said:

"There is no longer any question but that a state may enlarge, modify, diminish, or set aside the acts of a municipality or one of its political subdivisions, without their consent. This is based upon the theory that the state is supreme and the action of the state in so doing is binding upon the municipality or political subdivision. *Pawhuska v. Pawhuska Oil & Gas Co.* (1919) 250 U. S. 394, 63 L. ed. 1054, P.U.R.1919E, 178, 39 Sup. Ct. Rep. 526; *Trenton v. New Jersey* (1923) 262 U. S. 182, 67 L. ed. 937, 43 Sup. Ct. Rep. 534, 29 A.L.R. 1471; *Salem v. Salem Water, Light & P. Co.* (1919) 166 C. C. A. 465, P.U.R. 1919C, 956, 255 Fed. 295; *Laramie County v. Albany County* (1875) 92 U. S. 307, 23 L. ed. 552; *Hunter v. Pittsburgh* (1907) 207 U. S. 161, 52 L. ed. 151, 28 Sup. Ct. Rep. 40; *Sapulpa v. Oklahoma Nat. Gas Co.* (1922) 258 U. S. 608, 66 L. ed. 788, 42 Sup. Ct. Rep. 316.

"The state may exercise this right through its duly constituted Commission, by delegating the authority to it. A number of recent cases held that the

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Commission in the exercise of this authority may annul a provision in a franchise contract providing for free service to be performed by a public utility. *Winfield v. Public Service Commission* (1918) 187 Ind. 53, P.U.R.1918B, 747, 118 N. E. 531; *Hillsboro v. Public Service Commission* (1920) 97 Or. 320, P.U.R. 1920C, 817, 187 Pac. 617, 192 Pac. 390; *Springfield Consol. Water Co. v. Philadelphia* (1926) 285 Pa. 172, P.U.R.1926C, 321, 131 Atl. 716; *New Orleans v. New Orleans Water-Works Co.* (1891) 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142; *Western Oklahoma Gas & Fuel Co. v. Duncan* (1926) 120 Okla. 206, P.U.R.1927C, 277, 251 Pac. 37."

On rebuttal, Mr. Houlahan put on one of the county commissioners to show that the fire hydrant rentals which the Town refused to pay during the last four months of 1924, aggregating \$1,450, was compromised at the rate of \$200 per month, or a total of \$800.

The fire protection service rendered by the Company is, of course, essential to the safety and welfare of Goldfield

and its inhabitants, and its value is emphasized by the action of the Town in paying for the use of 20 hydrants since 1924, while at the same time requiring the water company to maintain and furnish service from 35 hydrants. In view of the value of the fire protection service to the town of Goldfield, by itself considered, we are of the opinion and find that \$200 per month is a reasonable rate for the Town to pay to the Company for the service in question.

Without order at this time the Company will be required to repack the valves of the fire hydrants so that firemen using them may not have their clothing badly wet from spraying water. As to this matter the Company will promptly communicate with the Commission and indicate the date when the improvement will be made, at the same time giving similar notice to District Attorney John A. Houlahan.

After full consideration of the questions herein reviewed, we are of the opinion that an order should be entered dismissing the complaint.

MICHIGAN PUBLIC UTILITIES COMMISSION

Re Indiana & Michigan Electric Company

[D-2513.]

Public utilities — Foreign corporation — Domesticating statutes.

1. A foreign utility corporation, upon domestication, is not restricted in its activities to those powers specified in the domesticating statute, where other statutes of the domesticating state permit the exercise of additional powers granted to it by the statute under which it was incorporated in its own state, p. 267.

RE INDIANA & MICHIGAN ELECTRIC CO.

Eminent domain — Foreign corporation — Domesticating statutes.

2. A foreign corporation which has become domesticated is permitted to exercise the right of eminent domain, although the domesticating statute does not authorize such action and the power is obtained from another law, p. 267.

[March 3, 1930.]

PETITION to condemn right of way by a domesticated foreign corporation; petition granted.

CUMMINS, Commissioner: Petitioner in this case is an Indiana corporation organized (among other purposes) —

"(a) To purchase or otherwise acquire, construct, own, and operate water power and hydraulic plants and steam plants for the production of electricity in any county of the state of Indiana, or in any county in the state of Michigan in which said company may now or hereafter conduct or operate its business."

It has been domesticated in Michigan and is conducting business in Michigan in harmony with the purpose above stated. It desires to construct a high-tension line from Mishawaka, Indiana, to its plant in Benton Harbor, Michigan, in order to make available for its customers a greater supply of electric energy than it is capable of developing at its Michigan plant. It has procured by purchase the necessary right of way for the construction of this line, except that over one piece of land owned by William Matthews.

Heretofore a certificate such as is provided for in § II of Act No. 238 of the Public Acts of 1923, was granted to petitioner on an ex parte hearing, and the above named Mr. Matthews now appears and moves that this certificate be vacated and the peti-

tion dismissed on the ground (among others) that there is no law conferring either expressly or by necessary implication the power of eminent domain upon a foreign corporation domesticated in Michigan.

[1, 2] Michigan corporations organized for similar purposes must rely upon said Act No. 238 of the Public Acts of 1923 for their corporate existence and for the right of eminent domain; but there is a broad, general provision in the act that when organized they shall also "have and enjoy all the powers and privileges of corporations for pecuniary profit organized under said Act No. 84 of Public Acts of 1921 of Michigan and amendments thereto."

It should be noted at the outset, however, that Act No. 84 does not confer upon any corporation the right of eminent domain. For that right corporations organized under Michigan Law for purposes similar to petitioner's purposes must look to Act No. 238 of the Public Acts of 1923.

Our statute relating to the domestication of foreign corporations is Part 5, Chapter I, § 2, of said Act No. 84. It provides that no corporation can be admitted unless incorporated for a purpose for which a corporation could be formed *under the Laws of Michigan*. Let it be borne in mind that, in

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order to be entitled to admission under Act No. 84, a corporation does not have to have a purpose for which a corporation can be organized under Act No. 84:—it is sufficient if it has a purpose in whole or in part for which a corporation can be organized under *any* Law of Michigan, and it is clear that petitioner is a corporation having a purpose for which a Michigan corporation could be organized under Act No. 238 of 1923.

The statute further requires the secretary of state to state in the certificate which he issues *the act* (other than Act No. 84) or the section of Act No. 84 containing such purposes, and then such domesticated corporation "shall have all the powers, rights, and privileges . . . granted to . . . corporations organized under *such act* or section." It seems clear that this means organized under any act (other than Act No. 84) or any section of Act No. 84.

Plainly, then, a foreign corporation organized for a purpose for which a Michigan corporation could be organized under Act No. 84, has the powers, rights, and privileges conferred by Act No. 84, but if it is a corporation organized for a purpose for which a corporation organized in Michigan would have to be organized *under some other act*, then the foreign corporation becoming domesticated has the powers, rights, and privileges which are conferred by the other act. We think this language *expressly* confers the right of eminent domain upon petitioner. This seems too clear to need to be supported by authority, but authorities are not lacking.

Counsel for petitioner has cited in support of its application:—

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15 Cyc. p. 574; 20 C. J. p. 543; *People v. Fire Asso.* (1883) 92 N. Y. 311; *San Antonio & A. P. R. Co. v. Southwestern Teleg. & Teleph. Co.* (1900) 93 Tex. 313, 55 S. W. 117; *Russell v. St. Louis, S. W. R. Co.* (1903) 71 Ark. 451, 75 S. W. 725; *State ex rel. Miller v. Griffin* (1907) 46 Wash. 489, 90 Pac. 661; *San Joaquin & K. R. Canal & Irrig. Co. v. Stevinson* (1912) 164 Cal. 221, 128 Pac. 924; *Cumberland Teleph. & Teleg. Co. v. Yazoo & M. V. R. Co.* (1907) 90 Miss. 686, 44 So. 166; *Northwestern Electric Co. v. Zimmerman* (1913) 67 Or. 150, 135 Pac. 330; *New York, N. H. & H. R. Co. v. Welsh* (1894) 143 N. Y. 411, 38 N. E. 378; *Rogers v. Cosgrave* (1915) 98 Neb. 608, 153 N. W. 569; *Southern Illinois & M. Bridge Co. v. Stone* (1903) 174 Mo. 1, 73 S. W. 453; *Pittsburg Hydro-Electric Co. v. Liston* (1911) 70 W. Va. 83, 73 S. E. 86; *Carnegie Nat. Gas Co. v. Swiger* (1913) 72 W. Va. 557, 79 S. E. 3, 46 L.R.A.(N.S.) 1073.

These authorities all sustain the right of a foreign corporation upon being domesticated to exercise the power of eminent domain under the *particular statutes involved*. These statutes varied in their phraseology, but the general result was the same.

The question is an important one and it may be worth while to examine these decisions in more detail.

In *People v. Fire Asso. supra*, the statute expressly conferred upon foreign corporations when domesticated the full powers of *domestic corporations*, except as prohibited by law or limited by their charter powers.

In *San Antonio & A. P. R. Co. v.*

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Southwestern Teleg. & Teleph. Co., *supra*, the Texas statute conferred on foreign corporations all the privileges of corporations organized *under the Laws of the state of Texas*.

In San Joaquin & K. R. Canal & Irrig. Co. v. Stevinson, *supra*, the California statute conferred upon "persons" generally the right of eminent domain in certain cases and the California court held that a foreign corporation, no less than a domestic corporation, is a "person" within the meaning of the act.

In State ex rel. Miller v. Griffin, *supra*, there was a law conferring the right of eminent domain upon all railroad companies.

In Russell v. St. Louis, S. W. R. Co. *supra*, the statute provided that upon domestication the foreign corporation "*shall, to all intents and purposes, become a railroad corporation of this state.*"

In Cumberland Teleph. & Teleg. Co. v. Yazoo & M. V. R. Co. *supra*, the Eminent Domain Statute provided that all companies or associations of "persons," etc., should have the right of eminent domain.

In Northwestern Electric Co. v. Zimmerman, *supra*, the court said:—

"Section 6245 L. O. L. authorizing any person or corporation to condemn a right-of-way for electric wires includes foreign corporations, as the language is general."

In New York, N. H. & H. R. Co. v. Welsh, *supra*, the statute in question conferred the power upon "*every* railroad corporation."

The court held that this language applied to foreign corporations when domesticated.

In Rogers v. Cosgrave, *supra*, the P.U.R.1930C.

court held that under a certain statute relating to consolidations, the corporation became a domestic and not a foreign corporation.

In Southern Illinois & M. Bridge Co. v. Stone, *supra*, the court said, at p. 30 of 170 Mo.

"The language of § 1024, Rev. Stat. 1899, is explicit, that—

"'It (a foreign corporation on being domesticated) shall be subject to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the general laws of this state, and shall have no other or greater powers,' i. e., it shall have those of corporations of like character in this state . . . The plaintiff finds ample authority in an express statute for its condemnation of the lands described."

In Pittsburg Hydro-Electric Co. v. Liston, *supra*, there was a general statute conferring the right of eminent domain on telegraph, telephone, and electric power companies, etc., without limiting it to corporations organized under any act or organized under the Laws of the state.

The statute of West Virginia conferred upon domesticated corporations "the same rights, powers, and privileges that are conferred upon a domestic corporation created for the same purpose." (70 W. Va. at p. 91.)

Likewise in Southern Illinois & M. Bridge Co. v. Stone, *supra*, the statute relating to domestication broadly conferred on foreign corporations "the right to exercise the same powers and privileges conferred on like corporations organized under the laws of this state."

In Carnegie Nat. Gas Co. v. Swig-

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er, *supra*, the same statute was involved as in *Pittsburg Hydro-Electric Co. v. Liston, supra*.

It was claimed at the hearing that the purpose involved is not a public use and that the taking of this property is not necessary. These questions have been considered as upon a hearing *de novo*. There doesn't seem to be any dispute about the facts. The company doesn't propose to supply current to the residents along the right of way. It proposes to deliver current to its plant at Benton Harbor—there to be retailed to the public.

Nevertheless, we think the record clearly shows the purpose is a public

use, and that the taking is necessary for that purpose. The pending motion should, therefore, be denied.

Of course, the granting of the certificate in question cannot be in any way a final adjudication of the questions involved in the condemnation proceeding. It is merely a preliminary step necessary to be taken to entitle a party to proceed to have an adjudication of those questions. By denying the certificate, we might perchance preclude further action by petitioner. By granting it, we can't determine anything adversely to the land owner, except the right to institute the proceeding.

OHIO SUPREME COURT

Stark Electric Railroad Company

v.

Public Utilities Commission of Ohio et al.

[No. 21875.]

(— Ohio St. —, 170 N. E. 360.)

Certificates — Power of the Commission — Additional equipment.

1. The Commission has no authority to grant to a motor utility a certificate for the increase of equipment based upon any other reason except that of public convenience and necessity, p. 276.

Certificates — Evidence of convenience and necessity — Public use.

2. The fact that the public has become accustomed to the use of service operated without authority is not sufficient justification for the granting of a certificate authorizing such service, where a majority of the Commission is of the opinion that no real public necessity or convenience exists for the same, p. 276.

[February 12, 1930.]

ERROR brought by a street railway company objecting to an order of the Public Utilities Commission authorizing the increase of equipment by a bus line; order reversed.

APPEARANCES: Curtis M. Shetler, bert Bettman, Attorney General, and of Canton, for plaintiff in error; Gil- T. J. Herbert, of Cleveland, for Pub-
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lic Utilities Commission; Postlewaite & Bricker and D. C. Power, all of Columbus, for Transportation Company.

PER CURIAM. This case comes before this court upon the petition of the Stark Electric Railroad Company, appealing from an order of the Public Utilities Commission of Ohio, rendered the 25th day of June, 1929, upon the application of the Salisbury Transportation Company for an increase of service and equipment in the operation of its bus line between Canton and Alliance, wherein the Commission authorized an increase in equipment of two additional busses of 18-passenger capacity for the purpose of rendering such service.

Each Commissioner of the Public Utilities Commission filed an opinion in the case, and the facts may be gathered from excerpts from the several opinions.

By Commissioner Geiger:

"The present authorized equipment is one 18-passenger bus and time schedule No. 4 permitting hourly unrestricted service, is now effective. Time schedule No. 4 cannot be operated with the one 18-passenger car at present certificated. . . .

"The two companies have their southwest terminus at Canton. Between Canton and Louisville their routes parallel each other. At Louisville the bus route proceeds toward Alliance by route diverging from that of the electric company. The bus route passes through Death Curve, Harrisburg, Five Corners, and from thence into Alliance, having its terminus near the interurban station. From Louisville the interurban route pro-

ceeds more directly to Alliance, passing through territory that is not heavily populated and so far distant from the route of the bus company as not to serve the same territory except as to terminal points. Between Canton and Louisville, a distance of seven miles, the interurban company has been furnishing 15-minute service, and between Louisville and Alliance half hour service. Their service continues on this schedule during the busy portions of the day and a full 24-hour service is furnished by the operation of cars on an hourly schedule between Canton and Alliance from 9:30 P. M. until 5:00 A. M.

"In addition to this traction and bus service, the Pennsylvania Railroad Company runs eleven passenger trains each way between Alliance and Canton. Not all of these stop at Louisville.

"During a recent period the company has expended from \$250,000 to \$300,000 in re-equipping its roadway and furnishing new rolling stock so as to more efficiently serve the public. The company is furnishing very cheap transportation through the medium of special tickets and weekly passes. It would appear from the evidence that no complaint can possibly be made as to the operation of this electric line either as to roadbed, equipment, schedule, or rates charged. Between Canton and Louisville it is furnishing facilities that are equal or superior to service furnished in many cities. The management has certainly shown commendable activity in attempting to furnish acceptable transportation facilities to the territory which it serves. The company claims that if the Commission permits additional

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competition by granting the application of the bus company that it would be unable to survive and would have to withdraw from the field. The bus company, on the other hand, insists that the people in this territory are entitled to its services and that unless it is granted the schedule and equipment that it now requests it will be unable longer to continue in the transportation field. If the Commission is convinced that the operation of the bus line on the schedule applied for will result in the loss to the community of the electric transportation company, it is clearly the duty of the Commission to prevent destructive competition. The Commission, on the other hand, is desirous of promoting the welfare of all transportation companies and of preserving their service to the community through which they pass. We are confronted with the question as to whether the electric company can survive a more vigorous competition by the bus company and whether the bus company could give as effective service as that now furnished by the electric company, if the electric company were forced to retire from the field. The records show the following number of revenue passengers carried and the revenue collected for the respective years by the electric line:

<i>Revenue Passengers Carried.</i>	
1924	2,953,657
1925	2,772,197
1926	2,749,654
1927	2,764,953
1928	2,892,876
<i>Total Revenue.</i>	
1924	\$390,073.99
1925	352,129.16
1926	341,805.42
1927	320,531.09
1928	325,853.90

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"Until September, 1927, The Stark Electric Railroad Company sold power from which it derived revenue reflected in the operating statement. During the year 1928, the power service theretofore furnished by the railroad company was furnished to it by a subsidiary company known as the Alliance Power Company. The income and operating statements of the company show a loss of \$13,233.97 in 1923; a surplus of \$7,163.56 in 1924; a deficit of \$9,640.08 in 1925; a deficit of \$70,351.09 in 1926, and a deficit of \$60,183.53 in 1927. In the year 1928 the operation of the railroad shows a deficit of \$42,970 and the operation of the power company then furnishing the power a surplus of \$40,704, indicating that the deficit of the several years during which the company operated both the railroad and power plant was probably attributable to the operation of the railroad. The manager of the railroad states that there is hope that during the year 1929 the railroad will show a slight profit if it is permitted to operate without destructive competition.

"The report of the Salisbury Transportation Company shows as follows:

	*1926	**1927	***1928
Passengers carried	7,500	98,010	94,863
Total revenues	\$2,475.23	\$22,830.56	\$24,770.01
Total expenses	9,328.37	90,991.13	71,558.87
Net revenue (deficit)	6,853.14	68,160.57	46,788.86

* Covers period from October 1 to December 31, 1926. Certificate No. 53.

** Certificates 53 and 277.

*** Covers Certificates 53 and 277 from January 1st to March. Certificate 277 was abandoned in March, 1928.

"The operation shown for 1926 was for a two months period; for

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1927 a deficit of \$68,160.57 is shown; 1928 shows a decrease in the number of passengers carried from 98,010 to 94,863, and a deficit for the year 1928 of \$46,788.86. These figures show that the interurban transports thirty times as many as do the busses and that while there has been in recent years a slight increase each year in the number of passengers carried by the interurban there has been a slight decrease in the number of passengers carried by the bus company, as shown by the report of 1928 as compared with that of 1927.

"We cannot escape the conclusion that the traction company is now furnishing the large bulk of transportation service between Canton and Alliance and that the records clearly show that the traction company is more convenient and necessary to the public than is the bus company. The records also show that the traction company is gradually emerging from a nonprofitable to a profitable operation while the bus company has since its organization met with such heavy losses that it is impossible to predict a successful operation unless it succeeds in capturing so much of the business of the traction company as will make almost certain the destruction of the traction company.

"The majority of the Commission is of the opinion that on the facts disclosed by the record there would be no justification in permitting the bus company to operate a schedule that must seriously jeopardize the continued existence of the traction company while not insuring a stable operation of the bus company. The people in this territory have remarkably good service and while it might

be convenient for many to be permitted to have more frequent bus service yet that the inevitable result would be to destroy the traction company, or at least to render its operation unprofitable. If the traction company were compelled to retire from the field it is almost certain that the bus company could not furnish satisfactory transportation to the great number of people who now enjoy the service of the traction company. It is proper also to consider that the traction company furnishes freight facilities which could not be furnished by the bus company under any circumstances. We are of the opinion that the bus company has not shown such a demand as would justify the Commission in granting the schedule or equipment applied for.

"As to that portion of the applicant's route lying between the northeastern corporate limits of the village of Louisville and the southwestern corporate limits of the city of Alliance, we find that the same cannot be adequately served by the traction company and that such service is best furnished by the bus company. In order to permit the lawful operation of schedule No. 4 it will be necessary to allow an increase in the applicant's certificated equipment. Hence, the applicant will be permitted to add two 18-passenger busses to its present certificated equipment. This would give it three certificated 18-passenger busses which will, in the opinion of the Commission, suffice to maintain its schedule.

"We, therefore, conclude as follows: (a) That the applicant be allowed to increase its certificated equipment by adding two 18-passen-

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ger busses instead of three, as requested in the application. (b) That the applicant be ordered to operate under its schedule No. 4 on file with the Commission, same being issued on January 19, 1928, and effective March 21, 1928, which schedule provides for seventeen west bound and sixteen east bound trips daily between Canton and Alliance and that the schedule herein sought be denied.

"This will allow hourly, unrestricted service each way, during most of the day. Were it not for the fact that the Commission has allowed schedule No. 4, providing for hourly, unrestricted service between termini, and that this schedule has been operated since March 21, 1898 (although by the use of uncertificated equipment, and the people have thus become accustomed to an hourly unrestricted service, such hourly service would not now be permitted.

"Commissioner Klinger dissents from the finding and order."

By Commissioner KLINGER:

"The applicant, the Salisbury Transportation Company, is seeking to inaugurate one-half hour, unrestricted service between Canton and Alliance and Alliance and Canton, and also to increase its present certificated equipment of one 18-passenger bus to four 18-passenger motor vehicles. At the present time the applicant should be operating upon a 2-hour schedule under an order of the Supreme Court and the Public Utilities Commission, operating one 18-passenger bus thereon. . . .

"The applicant at the present time is authorized to operate one 18-passenger bus. (See the records of this Commission and orders under date of P.U.R.1930C.

March 21, 1928, and supplemental order of June 1, 1928). . . .

"At this time it might be well to give a little of the history of matters pertinent to the issue herein involved: Sadie Salisbury, the original holder of Certificate of Public Convenience and Necessity No. 53, being the certificate herein involved, was granted the same by affidavit, under the provision of § 614-87 of the General Code of Ohio. Under this certificate she was given authority to operate one 18-passenger motor propelled vehicle. Some time thereafter the Salisbury Transportation Company acquired this certificate and has ever since that time owned and operated the same. This applicant made a similar application some two years ago and the Commission under its finding and order of the 12th of April, 1927, P.U.R.1927C, 611; granted in part the prayer of said application and rejected a part. Thereafter a supplemental order was issued which has been herein referred to.

"Since the former application one Joseph F. Eberhard and Albert B. Schneider, former certificate holders, have ceased operation under said certificates and the same have now been abandoned. Applicant in its reply brief sets forth that it was the purchaser of one of these certificates which was shortly thereafter abandoned and the same was purchased for the purpose and with the intention of thereby obtaining through service from Canton to Alliance with a change of bus at Louisville. This proving impractical the applicant later abandoned the latter certificate and the other certificate holder has also since abandoned his service. This

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leaves the applicant company and the protestant company alone in the field serving the territory in question with transportation, supplemented with the service of the Pennsylvania Railroad Company, which runs eleven passenger trains each way daily between Alliance and Canton.

"This community has unequaled transportation service and it appears to me that every need and convenience is adequately served and if the policy as laid down by the supreme court of Ohio in the case of Scioto Valley R. & Power Co. v. Public Utilities Commission (1926) 115 Ohio St. 358, P.U.R.1927C, 186, 154 N. E. 320, and Stark Electric R. Co. v. Public Utilities Commission (1928) 118 Ohio St. 405, 161 N. E. 208, is followed, no additional service should be granted or allowed.

"It is hard to conceive why such a persistent demand exists if the sole purpose is the public need or convenience. According to the records on file with this Commission the Salisbury Transportation Company in 1926 had a net revenue deficit of \$6,853.14, and in 1927, \$68,160.57, and in 1928, \$46,788.86, and it is hard to understand why they persist in increasing their operating expenses in the face of these heavy annual losses. It is hard for me to understand how they are able to escape receivership. In fact, they cannot sustain these losses unless there is an interested person or institution that has other motives than the public convenience and necessity. It is quite plain to me that some one wants to wreck the Stark Electric Company, and the Salisbury Transportation Company is the willing instrument

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through which this design is being carried into execution. It is quite plain from the evidence that the traction company is now furnishing the large bulk of transportation service between Canton and Alliance and that the traction company is of greater convenience and necessity to the public than the bus company. I believe the evidence shows that there is adequate transportation facility and service between Canton and Louisville, and Louisville and Canton, and, further, that there is adequate service between Louisville and Alliance, and Alliance and Louisville, and Alliance and Canton, and also between Canton and Alliance, and, therefore, that portion of the application should be denied."

Commissioner McCulloch was of opinion that the public convenience and necessity was shown to exist for hourly unrestricted bus service and for an increase of two additional busses.

"Ordered [by Commissioners Geiger and McCulloch] that said Certificate of Public Convenience and Necessity No. 53, now held by the Salisbury Transportation Company, be, and hereby the same is modified and amended to authorize said the Salisbury Transportation Company to maintain thereunder the schedule of operations provided in Time Schedule No. 4, issued January 19, 1928, effective March 21, 1928, which provides for seventeen westbound and sixteen eastbound, unrestricted trips, daily, between Canton and Alliance, Ohio. It is further

"Ordered, that the application of said the Salisbury Transportation Company to add to the certificated

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equipment provided for operations under said Certificate of Public Convenience and Necessity No. 53, four motor propelled vehicles with a seating capacity for eighteen passengers each, be, and hereby it is denied. It is further

"Ordered, that Certificate of Public Convenience and Necessity No. 53, now, held by the Salisbury Transportation Company, be, and hereby the same is modified and amended to provide that the motor propelled vehicle equipment, thereunder to be operated shall be increased from one to three vehicles with a seating capacity of eighteen passengers each, and that, within five days therefrom said the Salisbury Transportation Company file with this Commission a statement of the equipment added under authority of this order, setting forth for each car, the state license number, the year and trade name of the vehicle, the engine number, and other identification data, and before the placing in service of said equipment, to pay to the treasurer of state the taxes prescribed, and file with this Commission the insurance policies required by law; all to become effective as of June 25, 1929. . . .

"Dated at Columbus, Ohio, this twenty-fifth day of June, 1929.

"Commissioner Klinger dissents in the finding and conclusions of the majority of the Commission."

[1, 2] It thus appears that the

majority of the Commission were of opinion that public necessity and convenience did not require the granting of the application for the additional equipment, and that one of the two Commissioners issuing the order concurred therein for the sole reason that the Salisbury Transportation Company had been operating, although unlawfully, three unrestricted busses since March 21, 1928, "and the people have thus become accustomed to an hourly unrestricted service," and expressly stated that but for that fact such service would not be permitted.

The Commission is not authorized to grant a certificate for increased equipment for any reason other than public necessity and convenience; and the fact that the public has become accustomed to such service, in the face of the expressed conclusion of the majority of the Commission that there is no public necessity or convenience therefor, affords no reason nor justification for the granting of such certificate. *Scioto Valley R. & Power Co. v. Public Utilities Commission* (1926) 115 Ohio St. 358, P.U.R.1927C, 186, 154 N. E. 320.

The order granting a certificate for increased equipment will be reversed. Order reversed.

Marshall, C. J., and Kinkade, Robinson, Jones, Matthias, and Allen, JJ., concur.

BEAVER TELEPHONE CO. v. PUBLIC UTILITIES COM.

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Beaver Telephone Company
v.
Public Utilities Commission of Ohio

(— Ohio St. —, 170 N. E. 173.)

Monopoly and competition — Telephones — Failure to keep anti-duplication agreement.

The Commission may properly decide that certain territory situated between boundaries agreed upon by two telephone utilities as separating their activities, but ignored by both, was subject to competitive telephone development and not pre-empted by any one company, and its order directing a telephone company to serve therein, upon petition of certain residents for service, was held to be authorized.

[February 5, 1930.]

ERROR upon request by a telephone company to review an order of the Public Utilities Commission directing another telephone company to extend service to residents of certain territory; affirmed.

APPEARANCES: Wilson, Hahn & Wilson, of Youngstown, for plaintiff in error; Gilbert Bettman, Attorney General, and T. J. Herbert, of Cleveland, for defendant in error.

PER CURIAM: One Ruhlman and about fifty others, residents of a part of Boardman school district, lying in Mahoning county, filed an application with the Public Utilities Commission asking that the Ohio Bell Telephone Company be permitted to furnish telephone service to the applicants, and that the Beaver Telephone Company be notified of that proceeding.

The Bell Telephone Company filed an answer stating that the Beaver Telephone Company was furnishing service in that locality, and that the

Bell Telephone Company did not hold itself out as furnishing service therein. The Beaver Telephone Company intervened in the proceeding, participated in the hearing, and opposed the application of the complainants, claiming that it had pre-empted the territory in controversy, and that it was giving adequate service therein.

After a hearing the Commission made certain findings, and ordered the Bell Telephone Company to install and provide the applicants with local exchange telephone service from its central office at Youngstown, and to provide such service to all other residents of the Boardman school district. Both telephone companies excepted to the order of the Commission, but only the Beaver Telephone

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Company applied for rehearing, which was denied, and that company is the only one prosecuting error to this court.

The order of the Commission was predicated upon the following findings of fact made by it: "That said territory [denominated the Boardman school district] is and has been the scene of a dual telephonic development by the Ohio Bell Telephone Company and its predecessors, and by the Beaver Telephone Company; that said territory is not pre-empted for local development by said the Beaver Telephone Company."

Basing its ruling upon these findings, the Commission made the order as above stated. If these findings of the Commission are properly supported by the evidence, then the legal questions presented by counsel for plaintiff in error do not arise, since there would be no invasion by either of the telephone companies of the other's territory.

It appears that, some years before, both companies had come to an understanding whereby a dividing boundary line in the Boardman school district was to mark their separate activities; but it also appears in testimony that this boundary line was ignored by both companies occupying territory on both sides thereof. This situation resulted in the Commission finding that the territory was the scene of a dual telephonic development and was not pre-empted by the Beaver Telephone Company. We are unable to say that the Commission erred in the findings so made, or that its order in respect thereto was unreasonable or unlawful. Upon the case here presented, it is the judgment of this court that the order of the Commission should be affirmed.

Order affirmed.

Marshall, C. J., and Kinkade, Robinson, Jones, Matthias, Day, and Allen, JJ., concur.

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

United States of America

v.

Munson Steamship Line

[No. 2908.]

(37 F. (2d) 681.)

Interstate Commerce Commission — Construction of Interstate Commerce Act.

1. The words "common arrangement" as contemplated by Congress in giving jurisdiction to the Interstate Commerce Commission over water carriers transporting goods partially conveyed by rail were held to be restricted to an act between rail and water carriers giving to either or both an interest in the entire undertaking so as to constitute the continuous transportation in some sense a common enterprise, thereby giving rise to

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a possibility of evading rate regulation imposed by law on rail carriers, p. 283.

Interstate Commerce Commission — Jurisdiction over water carriers.

2. In interpreting the meaning of the term "common arrangement" as used in the interstate commerce act giving jurisdiction to the Interstate Commerce Commission over water carriers transporting goods partially conveyed by rail, the intention of Congress was held to subject water carriers to the jurisdiction of the Commission only to the extent necessary to prevent evasion of the act on the part of rail carriers, p. 283.

[January 14, 1930.]

PROCEEDING by the Attorney General of the United States requesting the Interstate Commerce Commission for a writ of mandamus requiring a steamship company to file rates covering the transportation of goods from Baltimore, Maryland, to Florida ports; judgment of the lower court in favor of defendant affirmed. See 33 F. (2d) 211.

This was a proceeding by the United States under § 20, par. 9, of the Interstate Commerce Act (49 USCA § 20 (9)). It was instituted by the Attorney General, at the request of the Interstate Commerce Commission, for the purpose of obtaining a writ of mandamus requiring the Munson Line to file with the Commission, under § 6 of the Interstate Commerce Act (49 USCA § 6), schedules of its rates and charges covering the transportation of goods by water from Baltimore, Maryland, to ports in the state of Florida. Defendant denied that in such transportation it was acting with any rail carrier under a common control, management, or arrangement for a continuous carriage or shipment; and for this reason denied that there was obligation on its part to file schedules under the act. The case was heard before Judge Coleman and a jury, and, at the conclusion of the testimony, a verdict was directed for defendant, and the government appealed.

The facts are practically undisputed.
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ed. Defendant operates lines of steamers, in the coastwise and inter-coastal trade, between various ports of the United States, one line being from Baltimore to Jacksonville and Miami, Florida. It accepts from rail carriers at Baltimore freight which has been transported from inland points, and from there transports it to these Florida ports. This freight is not covered by through bills of lading or by through or joint rates, and there is no agreement between defendant and the rail carriers for the division of the aggregate of the separate rail and water rates, or any customary or conventional division thereof. The freight is shipped to Baltimore in care of, or "order notify," the defendant, with the name of the ultimate consignee in Florida noted on the waybill and bill of lading, but not, however, either as shipper or consignee. Defendant receives the freight at Baltimore as agent of shipper and pays the rail charges. It then issues a bill of lading to the shipper covering the water transportation. Upon delivery

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in Florida, it collects from the consignee its own charges as well as the rail charges which it has advanced; but the latter are collected, not as agent for, or under any agreement with, the rail carrier, but because they have been advanced as an incident to the contract between defendant and the shipper. The details with regard to defendant's handling of this traffic were well stated by the learned judge below as follows:

"The rail carrier to Baltimore issues its bill of lading to the shipper, showing the destination of the shipment to be Baltimore. In due course of transportation the merchandise is delivered to the Munson Line. The bill of lading is surrendered to the rail carrier. The freight of the rail carrier is paid by the Munson Line, which then issues its bill of lading to the shipper for carriage of the goods by water from Baltimore to the point of destination. The Munson Line is instructed by separate written advice from the shipper as to what disposition to make of the goods, and the Munson Line issues its own separate bill of lading accordingly. The freight rate for the transportation of the goods by rail to Baltimore is fixed and determined by the tariffs and the separate bill of lading issued by the rail carrier, and is paid by the Munson Line at the request of the shipper to the rail carrier, upon presentation of bills for the freight by the rail carrier.

"There is no evidence in the present case of any agreement of any kind, verbal or written, existing between the shipper or the Munson Line, or both, with the rail carrier, except as is embraced in the rail car-

rier's bill of lading, to which, as I just explained, the respondent is not a party, and except as is also embraced in the related documents, such as the waybill and so forth; that is to say, there is no agreement in evidence in this case between the rail carrier and the water carrier with regard to either a through bill of lading or any agreement for division between them of a through rate. Neither has filed with the Commission any tariff or schedule of charges for a through rate, partly by rail and partly by water. In all cases the destination under the rail billing is Baltimore. The consignee named is either the shipper at Baltimore or the Munson Line, as agents for the shipper, or the shipper in care of the Munson Line. The Munson Line looks to the shipper for instructions as to the further carriage of the merchandise, and in every case the Munson Line receives a separate written order from the shipper as to the further carriage. The Munson Line then makes out and sends to the shipper its own bill of lading for the ocean carriage, in which its freight rate is specified. If the railroad freight rate has not been paid by the shipper, it is advanced and paid—that is, if it is not a prepaid shipment—it is advanced and paid for his account by the Munson Line to the rail carrier on presentation of bill, irrespective of its collection by the Munson Line from the consignee at the point of destination at the end of the water carriage.

"In so far as the rail carrier is concerned, since it does not issue a through bill of lading, its contract of carriage terminates when the goods are delivered in Baltimore. Upon

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their arrival there, the railroad sends an arrival notice to the Munson Line, as in the case of any other shipment consigned to Baltimore, and, after the free time allowed by the tariff regulations, the railroad ceases to be liable as a carrier, and becomes liable merely as a bailee. If the billing is an order bill of lading, as distinguished from a straight bill of lading, it must be surrendered to the rail carrier before delivery of the goods is made.

"In support of its claim that the respondent is a party to an arrangement common to it and the rail carrier, and that, therefore, the claim of the separate billing is a mere subterfuge to escape the jurisdiction of the Commission, the government stresses the fact that there is noted in the descriptive portion of the billing, and on the annexed or accompanying papers, the ultimate destination of the shipment, but the court finds that there is no evidence tending to show that this does more than serve as a convenience in the subsequent movement of the freight; that is to say, there is no evidence of any greater joint arrangement between the rail and water carriers than has just been described.

"In accepting shipment from the rail carrier and in advancing the freight charges at Baltimore, the steamship company acts as agent for the shipper. . . . The rail carrier's contract ends with the delivery on the pier, unless there be some terminal or lighterage service. The transfer of the goods from the pier to the vessel is performed by stevedores acting for the water carrier, and the charges for the same are absorbed by the water carrier. It will be admitted, of

course, that this entire method of handling shipments tends toward more prompt and efficient transportation and delivery, and is of mutual advantage both to the shipper and to the carrier, but the court finds that this in itself is not sufficient to offset the legal independence which the court finds exists between the contract of carriage of the one carrier and that of the other.

"The government also stresses the fact that, under the plan adopted of settling the rail carrier's freight bill, the respondent, and, therefore, the shipper, is accorded a greater credit period than the ordinary consignee at Baltimore obtains under existing carrier's rules. But this also the court finds is merely incidental to an arrangement, and is not indicative of a common arrangement, such as the act contemplates. Whether more credit is actually now being extended by the railroad to the Munson Line than the law allows is a question which may require investigation in a proper proceeding, but it does not prove, the court thinks, or tend to prove, in the absence of more evidence on the point, such common arrangement between the two carriers, covering the situation here complained of, as that term must be understood to be used in the law." 33 F. (2d) 211, 213.

APPEARANCES: A. W. W. Woodcock, United States Attorney, of Baltimore, Maryland, and Elmer B. Collins, Special Assistant to Attorney General (John Lord O'Brian, Assistant to Attorney General, and Z. W. Scott, Attorney, Interstate Commerce Commission, of Washington, District

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of Columbia, on the brief) for the United States; W. Calvin Chesnut, of Baltimore, Maryland, Frank Lyon, of Washington, District of Columbia, and Irving L. Evans, of New York city, for appellee.

Before Parker and Northcott, Circuit Judges, and McDowell, District Judge.

PARKER, Circuit Judge (after stating the facts as above): Every common carrier subject to the provisions of the Interstate Commerce Act (49 USCA § 1 et seq.) is required, under penalty, to file with the Interstate Commerce Commission, and print and keep open for public inspection, schedules of its rates, fares, and charges, and conform thereto. 49 USCA § 6. The question in the case is whether the defendant, being admittedly a carrier by water, is subject to the provisions of the act. It is well settled, of course, that water transportation unconnected with transportation by rail is not subject to its provisions. *Wilmington Transp. Co. v. California R. Commission* (1915) 236 U. S. 151, 153, 59 L. ed. 508, P.U.R. 1915A, 845, 35 Sup. Ct. Rep. 276; *Ex parte Koehler* (C. C. 1887) 30 Fed. 867, 869; *In the Matter of Jurisdiction over Water Carriers* (1909) 15 Inters. Com. Rep. 205, 207; *Corona Coal Co. v. Secretary of War*, 69 Inters. Com. Rep. 389. Water carriers are subject, not to the Interstate Commerce Commission, but to the United States Shipping Board, and are required to file schedules of maximum rates with that Board, which is given supervisory power over their rates and practices. 39 Stat. 735, 46 USCA § 817. It P.U.R.1930C.

is true that, under the Panama Canal Act of Aug. 24, 1912, 37 Stat. 560, 568, 49 USCA § 6 (13), the Commission is given jurisdiction to establish through routes and maximum joint rates over rail and water lines. *United States v. New York C. R. Co.* (1926) 272 U. S. 457, 71 L. ed. 350, 47 Sup. Ct. Rep. 130; *Chicago, R. I. & P. R. Co. v. United States* (1927) 274 U. S. 29, 71 L. ed. 911, 47 Sup. Ct. Rep. 486. But it has not here attempted to exercise the power conferred by that act, and we may accordingly dismiss it from consideration.

All of the foregoing is conceded by the government, but it contends that defendant's transportation from Baltimore to the Florida ports is part of a continuous carriage or shipment begun by rail, and that the rail and water transportation are thus used under a common arrangement within the meaning of § 1(a) of the Interstate Commerce Act, as amended, which provides that the act shall apply to common carriers engaged in "the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment." 49 USCA § 1(a). It is admitted that defendant is not under a common control or management with any railroad line, and so the question is further narrowed to whether it handles the traffic in question under a "common arrangement for a continuous carriage or shipment" within the meaning of the act. We agree with the court below that it does not.

The meaning of "common arrange-

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ment," as thus used, is to be sought, not in abstract definitions, but in the purpose for which it was incorporated in the Interstate Commerce Act. The purpose of Congress in enacting that statute was not to regulate carriers by water but carriers by rail; and water carriers were made subject to its provisions only in so far as was necessary to prevent evasion of the act on the part of rail carriers. As said by Chairman Knapp of the Interstate Commerce Commission (later a Judge of this court) in the case entitled *In the Matter of Jurisdiction over Water Carriers*, *supra*, 15 Inters. Com. Rep. at p. 207:

"Looking to the history of the enactment, and without attempting to quote the pertinent portions of the congressional debates and committee reports preceding the enactment of the law in 1887, there can be no doubt that the main purpose of the act was to regulate transportation by railroad; that the regulation of water lines was merely incidental and collateral, and was included in order that the regulation of railroads might be effective and not virtually nullified by arrangements between railroads and water lines."

It is clear that, but for the control given over transportation partly by rail and partly by water, such provisions of the act as the long and short haul clause and those prohibiting preferences, rebates, and special rates, could have been evaded without difficulty by manipulation of the water rates in cases where both rail and water carriage were used and both carriers were under a common control or management. This danger was to be anticipated also where, although

common control and management were absent, there was an arrangement between the carriers for transportation as a single joint enterprise, as in case of through billing or conventional division of rates; and it was evidently to cover cases of this sort that provision was made for jurisdiction in cases of "common arrangement for a continuous carriage or shipment," as well as in cases of common control or management. In other words, Congress was guarding against the possibility of evasion arising from the fact that water carriage was a part of the transportation furnished; and it was intended to subject the water carrier to the jurisdiction of the Commission where it was within the power of the rail carrier to evade the act by his control over water rates, whether by control or management of the water carrier or other arrangement.

[1, 2] It follows from this, we think, that the "common arrangement" contemplated by the act must be one between the carriers themselves, giving to one or the other, or both, such an interest in or control over the entire undertaking as to constitute the continuous transportation in some sense a common enterprise; for under no other sort of arrangement would there exist the possibility of manipulating water rates so as to evade the act designed for the regulation of rail carriers. Such an arrangement as one to deliver freight at the end of a rail line to a water carrier to whom it is consigned and who transports it under a separate contract with the shipper, is clearly not a common arrangement within the spirit of the provision which we

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are considering; for, while such an arrangement might result in continuous transportation, it would furnish to the rail carrier no opportunity to evade the act, against which the provision was directed.

We must bear in mind, also, in interpreting the provision, that "common arrangement" is a general term used in connection with the more specific terms, "common control" and "common management," and, under the ejusdem generis rule, it must be interpreted as an arrangement analogous to common control or management; i. e., an arrangement attended with similar advantages and opportunities to the rail carrier and similar dangers to the public, having in view the reason and purpose of the provision. An arrangement which is nothing more than a provision for the delivery of freight to the agent of the shipper at the end of rail transportation is manifestly not such an arrangement.

In one of the earliest cases arising under this provision, *Ex parte Koehler* (C. C. (1887)) *supra*, 30 Fed. 867 at p. 869, Judge Deady said:

"But the interstate commerce act does not include or apply to all the instrumentalities or agencies used or engaged in interstate commerce. It does not include any water craft unless it is used in connection with a railway, 'under a common control, management, or arrangement, for a continuous carriage or shipment.'"

... The mere fact that a railway wholly within a state and a vessel running between said state and another meet at a point within the railway state, and thus form a continuous line of transportation between the two

states, by the one taking up the goods delivered by the other at its terminus, and carrying them thence to their destination, does not bring the carriers who so use the railway and steamer within the act. So long as the railway and steamer are each operated under a separate and distinct control, making its own rates, and only liable for the carriage and safe delivery of the goods at the end of its own route, the act does not apply to the transaction. To make these carriers subject to the act, the railway and vessel must, as therein provided, be operated or used under a 'common control'—a control to which each is alike subject, and by which rates are prescribed and bills of lading given for the carriage of goods over both routes as one.

"On this apparently plain exposition of the act, the railway of the Oregon & California Company and the steamers of the Oregon Railway & Navigation Company are not 'used under a common control, management, or arrangement' in this respect, and therefore are not subject to the act, although engaged in interstate commerce. Each carrier makes its own rate, and undertakes for the carriage and delivery of goods not otherwise than over its own route. The fact that both are interested in maintaining the traffic between Oregon and California over this route and by this means, so as to secure it against the competition of the Oregon Pacific, is not material. Each is at liberty, as far as the other is concerned, to raise or further reduce its rates tomorrow if the exigencies of the traffic permit or require it. The present rate is not the result of any 'arrange-

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ment' between the two carriers 'for a continuous carriage or shipment' from Oregon to San Francisco, and vice versa, but only an independent, though concurrent, reduction of rates by each over its own route, for the purpose of retaining the traffic thereon against the competition of a rival route."

In *Mutual Transit Co. v. United States* (1910) 102 C. C. A. 164, 178 Fed. 664, 666, a prosecution for violation of the statute against rebating, it appeared that defendant there, as in this case, was a water carrier, and had been transporting freight delivered to it by a railway company. It had refunded to the shipper a part of the rate charged, and the only question was whether it was a carrier subject to the act. This turned on whether there was a common arrangement between the defendant and the rail carrier. In holding that there was not, the court, speaking through Judge Noyes, said:

"The phrase 'common arrangement,' in view of its context, evidently means an agreement or understanding between connecting carriers with respect to the transportation of merchandise and the charges and division of the charges to be made therefor. A mere agreement by an independent water carrier to accept freight from a connecting railroad, and to transport it for its own particular rate, might be an 'arrangement' for continuous carriage, but would not be a 'common arrangement.'"

In *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission* (1896) 162 U. S. 184, 192, 193, 40 L. ed. 935, 16 Sup. Ct. Rep. 700, P.U.R.1930C.

703 (the *Social Circle Case*), the court said:

"But when the Georgia Railroad Company enters into the carriage of foreign freight, by agreeing to receive the goods by virtue of foreign through bills of lading, and to participate in through rates and charges, it thereby becomes part of a continuous line, not made by a consolidation with the foreign companies, but made by an arrangement for the continuous carriage or shipment from one state to another, and thus becomes amenable to the Federal act, in respect to such interstate commerce. . . . All we wish to be understood to hold is, that when goods shipped under a through bill of lading, from a point in one state to a point in another, are received in transit by a state common carrier, under a conventional division of the charges, such carrier must be deemed to have subjected its road to an arrangement for a continuous carriage or shipment, within the meaning of the act to regulate commerce. When we speak of a through bill of lading, we are referring to the usual method in use by connecting companies, and must not be understood to imply that a common control, management, or arrangement might not be otherwise manifested."

It will be noted that, while the court does not hold that common control, management, or arrangement may not be manifested otherwise than by through billing, it clearly implies that, for any arrangement to come within the meaning of the act, it must result in the creation of a "continuous line;" i. e., a line over which goods are transported by virtue of agreement, express or implied, between the car-

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riers themselves. And we think that no case can be found holding that a common arrangement existed within the meaning of the act where there was not such "continuous line," created either by through billing or conventional division of rates. See Interstate Commerce Commission v. Goodrich Transit Co. (1912) 224 U. S. 194, 56 L. ed. 729, 32 Sup. Ct. Rep. 436; Louisville & N. R. Co. v. Behlmer (1900) 175 U. S. 648, 44 L. ed. 309, 20 Sup. Ct. Rep. 209; Standard Oil Co. v. United States (1910) 103 C. C. A. 172, 179 Fed. 614; United States v. Wood (1906) (D. C.) 145 Fed. 405, 411; United States v. Seaboard R. Co. (C. C. 1897) 82 Fed. 563; Levy v. Old Dominion S. S. Co. (1915) 91 Misc. 35, 154 N. Y. Supp. 227.

But under no possible definition of "common arrangement" could what is shown here bring the defendant within the meaning of the term. There was no "continuous line" for traffic created by virtue of the receipt of goods on through bills of lading or conventional division of charges, as in the Social Circle Case. There was, to apply the test laid down by Judge Noyes in the Mutual Transit Co. Case, *supra*, no understanding between the carriers with respect to the "charges and division of charges" to be made for transportation. There was no through bill of lading, no through or joint rate, no agreement for the division of the aggregate of the separate rail and water rates, and no agreement between the carriers, either express or implied, that defendant should carry the freight delivered to it to any destination. In short, there was no common arrangement of

any sort between the carriers giving them such an interest in or control over the shipment, from point of origin to the ultimate destination in Florida, as to constitute the transportation in any sense a common enterprise. There was an arrangement by which freight shipped to Baltimore, but destined by the shipper for further shipment to Florida ports under a separate contract, should be delivered to defendant as agent of the shipper; but this is a very different thing from a common arrangement between the carriers themselves for continuous transportation.

It is argued that a common arrangement for continuous transportation is shown by the fact that the rail carrier allows the name and address of the ultimate consignee in Florida to be noted on its waybills and bills of lading, and that its freight charges are paid by defendant. But it is clear that the notation in question is made merely for the convenience of the carriers in handling the freight, and that no contract or obligation with respect to further carriage arises between them because of same. On the contrary, the freight is handled by each carrier under a separate contract with the shipper, and neither has any part in the charges or obligations of the other.

The same is true as to the payment of rail charges by defendant. These charges constitute liens on the freight involved; and for defendant to pay them when taking possession of the freight for handling under its contract can no more be said to be a common arrangement between the carriers for continuous transportation than the payment of such charges by a

UNITED STATES v. MUNSON STEAMSHIP LINE

warehouseman would make the railroad and warehouseman parties to a common enterprise. Defendant pays the rail charges, or becomes absolutely liable for them, when the freight is delivered to it. It does not participate in the charges of the rail carrier, nor does the latter participate in its charges; but each performs the service it renders under its own charges without sharing in any way either the charges or the liability of the other.

In the case of *Baltimore Association of Commerce v. American Hawaiian Steamship Co.* before the Interstate Commerce Commission, the very question was involved which is involved here. While the case was dismissed before being heard by the Commission, Examiner Hurley filed a report, finding that the Commission was without jurisdiction over the water carriers, and what he says as to notations on bills of lading and the payment of rail charges is of interest here. Said he:

"The indication of a Pacific Coast Port in the descriptive portion, or body, of the railroad bill of lading is but incidental and of no binding force or effect with respect to the contract of carriage. The evidence shows that the indication in the steamship bills of the railroad car from which the traffic is received is merely for convenience and identification purposes to enable shippers or carriers to check rates or to assist in placing responsibility for damage. In accepting the shipment from the rail carrier and in advancing the rail charges at the North Atlantic port the steamship company obviously is acting as agent for the Pacific Coast consignee. The relationship between the

steamship company and the railroad can not be said to be different than that between the railroad carriers and agents of other consignees. The absorption of stevedoring and lightering charges by the rail carriers does not differentiate intercoastal traffic from traffic consumed at the port itself or from export traffic. As heretofore stated, the rail carrier's contract ends with delivery of the traffic on the pier. The transfer of the goods from the pier to the vessel is done by stevedores acting for the water carriers and the charges are absorbed by the water carrier.

"The method of handling the traffic under consideration, although indicative of an arrangement for its prompt and efficient interchange, is lacking in the essentials necessary to constitute a 'common arrangement' between the rail and the water carriers. On the contrary it clearly indicates their independence."

In the very recent case of *Luckenbach Steamship Co. v. Southern R. Co.* decided October 8, 1929, the Commission itself said that water carriers handling freight substantially in the manner in which it is handled by defendant here were not subject to the jurisdiction of the Commission. In that case the steamship company, which handled freight which had been or was to be transported by rail carriers for a part of its journey, petitioned that these carriers be required to file schedules of proportional rates lower than their regular local rates for rail carriage. In denying the petition, the Commission, speaking through Commissioner Brainerd, used the following pertinent language:

"The movement by water-and-rail

UNITED STATES CIRCUIT COURT OF APPEALS

in connection with complainant's steamships is not on through bills of lading. Complainant is not a party to joint rates with defendants. There is no arrangement for through and continuous transportation from origin to inland destination in connection with complainant's line and its rates and charges are not subject to regulation by this Commission. . . . Complainant's charges on this traffic for its long haul vary from time to time. They have been as low as 30 cents in recent years. Its rates may be changed at any time at its discretion without being subject to suspension by this Commission. . . . Complainant, acting as a free lance in the transportation world, refuses to place itself in a position wherein its rates and charges might become subject to regulation by this Commission and yet seeks to invoke our aid in assisting it to divert from carriers subject to the act, and whose rates and charges are subject to regulation by us, certain traffic which the rail carriers now enjoy, on the plea that the situation, competitive or otherwise, does not justify the conduct of the rail carriers here complained of whose lines are used to complete the transportation of traffic brought into the ports by the complainant's boat lines and destined to points beyond via rail."

The government relies upon a line of cases, including *Baltimore & O. S. W. R. Co. v. Settle* (1922) 260 U. S. 166, 67 L. ed. 189, 43 Sup. Ct. Rep. 28; *Baer Bros. Mercantile Co. v. Denver & R. G. R. Co.* (1914) 233 U. S. 479, 58 L. ed. 1055, 34 Sup. Ct. Rep. 641; *Texas & N. O. R. Co. v. Sabine Tram Co.* (1913) 227 U. S. 111, 57 L. ed. 442, 33 Sup. Ct. Rep. 229; and

Southern Pacific Terminal Co. v. Interstate Commerce Commission (1911) 219 U. S. 498, 55 L. ed. 310, 31 Sup. Ct. Rep. 279, which hold that whether a shipment is interstate or intrastate depends upon the essential nature of the movement, and that neither through billing, uninterrupted movement, continuous possession by the carrier, nor unbroken bulk is an essential of a through interstate shipment. Those cases, however, have no application here. There is no question that the shipments here are moving in interstate commerce from the time they leave the point of origin until they reach their ultimate destination, but this would be true even though a part of the transportation were made without the aid of a common carrier. *Champlain Realty Co. v. Brattleboro* (1922) 260 U. S. 366, 67 L. ed. 309, 43 Sup. Ct. Rep. 146, 25 A.L.R. 1195. The question here is not as to the ultimate destination of the shipment, as in those cases, but whether there was a common arrangement between the carriers by which they agreed to carry it to this ultimate destination. Unquestionably the freight in question is bound for an ultimate destination in Florida, but it reaches there, not by virtue of any common arrangement between the carriers, but by virtue of contracts made by the shipper with each carrier separately. This we think is decisive of the case.

In holding that the defendant was not shown to be subject to the requirements of the statute, we think that the decision of the learned judge below was correct; and same is accordingly affirmed.

Affirmed.

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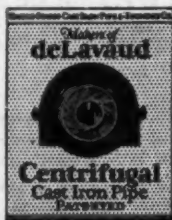
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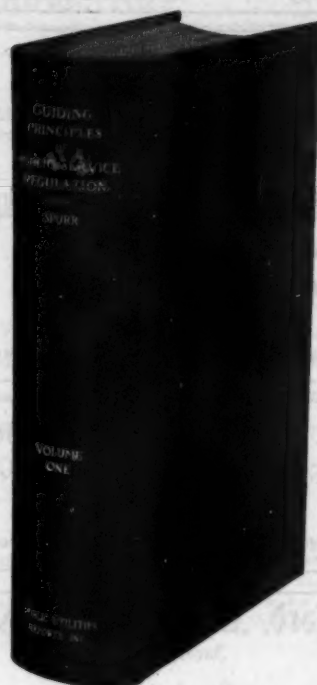
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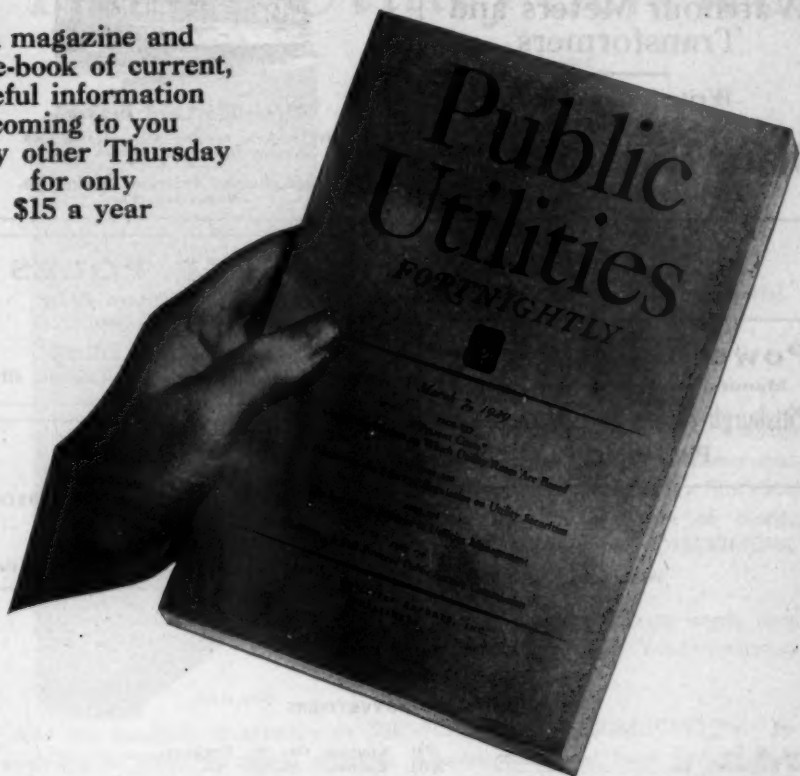
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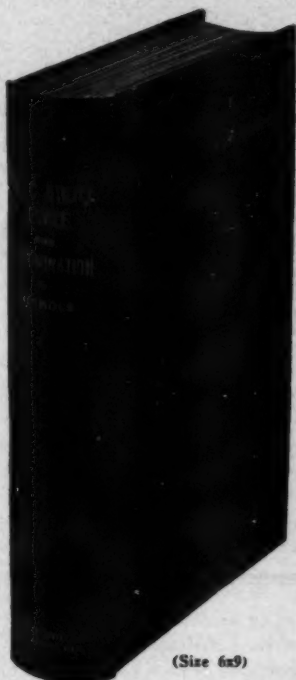
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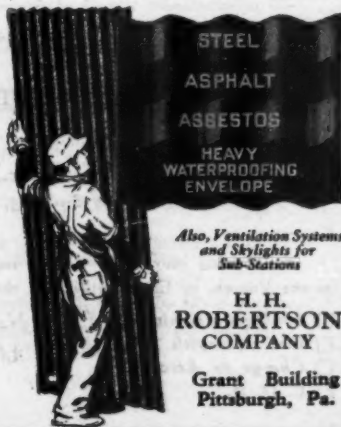
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